UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

Trump Ruffin Commercial LLC

Employer **Case No. 28-RC-153650**

and

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, A/W UNITE HERE INTERNATIONAL UNION

Petitioner

PETITIONER'S OPPOSITION TO TRUMP RUFFIN COMMERCIAL LLC'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE

Submitted by:

Eric B. Myers
Davis, Cowell & Bowe, LLP
595 Market Street, Suite 800
San Francisco, CA 94105
Telephone: 415-597-7200
Facsimile: 415-597-7201
E-Mail: ebm@dcbsf.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Petitioner LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS ("Petitioner") hereby opposes Trump Ruffin Commercial LLC ("Trump")'s request for review of the Regional Director for Region 28's Decision and Certification of the Petitioner as bargaining agent for a bargaining unit of its employees. Trump's petition fails to state adequate grounds for review under the limitations of Rules 102.69(c)(2) and 102.67(d)(1)-(4). It should be denied.

OVERVIEW

On December 4 and 5, 2015[1], a majority of Trump employees voted in favor of union representation in a secret ballot election conducted by the National Labor Relations Board. Trump ran a vigorous but unsuccessful campaign to defeat the Petitioner. Since 2014, it had fought workers' organizing efforts by suspending union activists, committing unfair labor practices, and unleashing an aggressive propaganda operation to deter workers from supporting the union. But Trump's employees were undeterred, and a majority voted in favor of representation.

Trump filed objections to the election, and presented some 22 witnesses over 16 days of hearing before the Hearing Officer. On February 18, 2016, the Hearing Officer issued her Report on Objections ("Report") recommending that Trump's objections be overruled in their entirety.

Trump filed exceptions to the Hearing Officer's Decision to the Regional Director for Region 28. On March 21, 2016, the Regional Director issued his Decision rejecting Trump's exceptions and certifying the Petitioner as collective bargaining agent for the

[1] All dates are 2015 unless otherwise indicated.

proposed bargaining unit.

Trump now requests that the Board review and reverse the Regional Director's certification. Trump ostensibly does so based on the grounds for review set out in Rule 102.67(d)(1)-(4). In fact, Trump seeks to re-try the case in all its minutiae before the Board.

Trump's request for review should be denied for four reasons.

First, Trump identifies no way in which the Regional Director departed from officially reported Board precedent. To the contrary, Trump premises its arguments on legal theories that the Board has rejected while largely pretending that controlling caselaw does not exist.

Second, Trump identifies no clearly erroneous finding on any substantial factual issue that resulted in prejudicial error. To the contrary, Trump employs overblown rhetoric and phony indignation to disguise the fact—obvious to anyone who attended the hearing—that its witnesses were guessing at their testimony at best and lying about it at worst.

Third, Trump fails to show that the conduct of the hearing or any ruling resulted in any prejudicial error. To the contrary, if any fault can be found, it is that the Hearing Officer afforded Trump *too much leeway* in pursuing theories of objectionable conduct that were not encompassed within the filed objections.

Fourth, Trump asks the Board to reconsider its approach to settled legal questions on matters such as union polling of employee sentiment and the responsibility of the union for objectionable conduct allegedly committed by its supporters during an

organizing campaign. In the former situation, Trump asks the Board to overturn decades of precedent on the subject; in the latter case, Trump asks the Board to adopt the Fourth Circuit Court of Appeal's narrow approach to agency, an approach that the Board has rejected with approval by the D.C. Circuit.

The Board's latitude for granting review of a Regional Director's certification is narrow. Trump has not met the necessary standard. Its request for review should be denied.

ARGUMENT

I. The Regional Director correctly applied existing law to determine that committee members were not union agents.

Trump asks the Board to overrule the Regional Director and Hearing Officer's finding that committee members were not agents of the union. In doing so, Trump asks the Board to espouse an expansive approach to agency promulgated by the Fourth Circuit in *N.L.R.B. v. Georgetown Dress Corporation.*, 537 F.2d 1239 (1976), and its progeny—an approach to agency that the Board has repeatedly rejected. While Trump grudgingly—and for the first time—acknowledges prevailing Board law as set out in cases such as *Advance Products Corp.*, 304 NLRB 436 (1991), Trump dismisses the relevancy of these cases. In doing so, it effectively asks the Board to conduct a trial *de novo* on the record, seizing selectively on its version of controverted facts to arrive at a conclusion that is at odds with the Board's treatment of alleged objectionable conduct by impassioned employees during representation campaigns.

Instead of addressing existing Board law, Trump creates a strawman argument by

polemicizing that the Regional Director invented a new "test" for agency by which any amount of involvement by the union in an organizing campaign defeats an employer's claim that employees may be deemed agents. Properly read however, the Board's cases have focused pragmatically on whether the union has relied exclusively on committee leaders to convey its message and to conduct its organizing efforts, or whether committee members are merely *one* conduit among others for union communication such that employees would perceive the union's distinct presence during the campaign. Trump's complaints about the Regional Director's application of Board law ring hollow given that Trump consistently failed to acknowledge controlling caselaw at any stage of the litigation below, and even now barely takes note of it.

We will start by explaining the law as it actually stands. We will then address the Board decisions upon which Trump principally relies, *Bio-Medical Applications of Puerto Rico, Inc*., 269 NLRB 827 (1984) and *Bristol Textile Co*, 277 NLRB 1637 (1986), showing that they are based on unique facts and have no progeny in Board caselaw. We will next address the Fourth Circuit precedent that Trump employs to frame its analysis. These cases do not reflect Board law, but instead, an expansive view of agency that the Board and other circuit courts have rejected. Finally, we will address the facts adduced at hearing to show that, under the law as it actually stands, the Regional Director's finding of no-agency was unexceptional and no review is warranted.

A. Board law makes clear that organizing committee members are not per se agents of a union, and they are not agents here.

Agency via actual authority is created when an agent is given power to act on his

principal's behalf by the principal's manifestation to him, which may be either express or implied. *CWA Local 9431 (Pacific Bell)*, 304 NLRB 446, n. 4 (1991); *Fisher Stove Works*, 235 NLRB 1032, 1041-1042 (1978). Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief. *Corner Furniture Discount Center*, 339 NLRB 1122, 1122 (2003).

The Board has applied agency principals conservatively to the question of union responsibility for the conduct of zealous employees. *See Windsor House C&D*, 309 NLRB 693, 694 (Member Oviatt concurring) ("[w]hen it comes to the conduct of prounion employees . . . it would appear that the Board moves somewhat more cautiously in deciding whether the employers are union agents"); *Amalgamated Clothing & Textile Workers Union, AFL-CIO,CLC v. N.L.R.B.*, 736 F.3d 1559, 1566 (D.C. Cir. 1985) (finding it reasonable for the NLRB to reject the Fourth Circuit's "eyes and ears" theory of agency and recognizing that the Board is entitled to make a "plausible policy judgment concerning the extent to which the union ought to be held responsible for [an organizing committee's] members' conduct."). Moreover, agency established with respect to one course of conduct does not establish agency with respect to other acts. *See e.g.*, *Pan-Oston Co.*, 336 NLRB 305, 306 (2001) (party who has burden to prove agency must establish agency relationship with regard to specific conduct that is alleged to be unlawful); *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988) (evidence

establishing limited authority did not establish general agency with respect to the alleged misconduct); *N.L.R.B. v. Downtown Bld Servs. Corp.*, 682 F.3d 109, 113 (D.C. Cir. 2012) (while allowing that employees may be agents for statements regarding fee waivers made during card solicitation, "the name-calling, profanity, and other generally reprehensible behavior of which they are guilty were unrelated to the subject matter of the authorization cards. . . The Board was therefore justified in concluding those were outside the scope of the agency relationship.)

At odds with Trump's presentation of the law, the Board has repeatedly admonished that "[e]mployee members of an in-plant organizing committee are not, per se, agents of the union." *Foxwoods Resort Casino*, 352 NLRB 771, 772 (2008) [citing cases]. "[A]ctivities such as distributing literature, soliciting signatures on authorization cards, and talking to fellow employees about the union [are] insufficient to make employees general agents of the union." *Id.* In *Foxwoods Resort Casino*, the issue was whether an employee's list-keeping during the election was attributable to the union owing to the fact that she was a member of the employer's organizing committee. The committee at issue "was a group of about 105 employees [out of 2629 eligible voters] who spoke to coworkers about the Union, distributed literature, and met with union representatives to discuss working conditions and issues and to help identify coworkers who might be prounion." *Id.* As here, "[a]ny employee who wanted to call herself a member of the committee could do so." *Id.*

In rejecting the employer's claim of agency, the Board reasoned:

The evidence does not show that the committee members were the Union's

> primary conduits of communication to employees or that union representatives were generally absent from the campaign. [* * *] Rather, the Union maintained a substantial presence throughout the campaign, beginning the campaign with a staff of 10 to 15 organizers and increasing that number to about 50 by the week of the election. Employee organizing committee members did not conduct the Union's meetings; members attended home visits only in the presence of a union staff member. The Union occasionally asked committee members to "tell their stories" to the press about why they wanted union representation, and the Union's media specialist worked with employees on how to present their stories, but there is no evidence that those stories were presented as anything other than employees' personal views.

Id. at 772.[2]

In *Corner Furniture Discount Center, Inc.*, *supra* 339 NLRB 1122, the issue was whether Cosgrove, the union's most visible supporter at work, was an agent of the union when he threatened employees that how they voted would become known and that would suffer reprisals for voting against the union. The Board found that there was no evidence that Cosgrove had specific authority to make the threats, and then rejected the employer's argument that Cosgrove's role as a visible leader was sufficient to create general authority. The Board reasoned that "evidence that Cosgrove organized and spoke at the Union's campaign meetings, solicited authorization cards, and played a leading role in the campaign does not establish that he was a general agent of the Union. . . . Even if he was the Union's most active and vocal supporter at the Employer's facility, he was not the Union's only conduit to the employees. Thus, [the union organizer's] participation in the Union's campaign meetings, as well as his individual contact with employees during the

[2] Trump refers in its Brief to *Foxwood Resorts Casino* only once, but does no more than merely cite the case. Brief, p. 19. It ignored the case altogether in briefing before the Regional Director.

election campaign made it clear to the employees that the Union had its own spokesman separate and apart from active and enthusiastic union adherents." *Id.* at 1123.[3]

In *Advance Products Corp.*, *supra*, 304 NLRB 436 (1991), the Board found no union agency status for the acts of Frank. He was a visible proponent of the union and one of seven members of the "In House Organizing Committee" (or "IHOC") that carried out the union's organizing efforts inside the facility. Like other members of the IHOC, Frank solicited support for the union; discussed the union with employees and answered their questions; handed around the business card of the union representative involved in the organizing effort; distributed union literature, buttons, hats, and shirts; and kept the union representative informed of events that occurred in the plant, including the employer's campaign activities. Frank also served as the union's election observer during one voting session. *Id*. at 436. At the same time, the union employed three paid union organizers who actively conducted the campaign and who met with IHOC members weekly. In view of these facts, the Board ruled that "employees would not view the IHOC as the on-scene presence and authority for the Union. The IHOC members informed the union organizers of the concerns expressed by employees, but they did not decide or approve the contents of union literature and had little, if any, input into campaign strategy." *Id.* The Board concluded that Frank was "not a general agent of the Petitioner, but rather was only an enthusiastic union supporter and member of the IHOC." *Id*.[4]

[3] Trump does not cite or discuss *Corner Furniture Discount Center*.

[4] In contrast to its briefing before the Regional Director, Trump now at least cites *Advance*

In *United Builders Supply Co., supra*, 287 NLRB 1364, the question was whether Wentworth was acting as an agent of the union when he made threats against anti-union employees. The majority of the panel rejected a finding of agency, reasoning that while "it is clear that Wentworth was a leading, if not the leading, union supporter and his actions reflected that status . . . [t]he Board has never held . . . that such status alone is sufficient to establish general union agency." *Id.* at 1365. The Board reasoned that:

> while [union organizer] Walsh must have known of some of Wentworth's actions, it is simply not established in the record to what degree Walsh was aware of those actions of Wentworth that were not expressly authorized, thus eliminating the possibility of finding that Walsh implicitly created apparent authorization of other conduct by ratification. Finally, we note that the Petitioner did not abdicate its role in the campaign here and, through Walsh's conduct of union meetings and other activity, it was clear to employees that the Petitioner had its own spokesman separate and apart from union activists such as Wentworth.

Id. In this regard, it bears noting the dissent's description of the extensive activities Wentworth *did* engage in as employee-leader: he arranged 18 to 25 meetings at a local bar to discuss the union and the upcoming election; he invited and urged virtually every employee to attend these meetings, sometimes with the offer, "drinks are on me;" he set up three or four meetings for Walsh (the union organizer) to speak; he made numerous phone calls to employees to discuss the upcoming election and sway their votes; he boasted to the Employer's general manager that if the organizing drive was successful, he

---

Product Corp. in its Brief. *See* Brief, p. 23. But it does so by falsely stating that only "one" Board member found agency status (two did, *i.e.*, a <u>*majority*</u> of the panel) and by blithely calling the case "easily distinguishable." In reality, Member Oviatt effectively dissented from the Board's approach by concurring in the result only; he argued in favor of the expansive approach to agency that Trump urges here. *See* discussion *infra.* Nothing Trump says about either the law in general or the facts of this case in particular should be accepted without close scrutiny.

would be made steward; he informed Walsh that he had recently "bought" the vote of a newly hired employee; he negotiated the settlement terms of unfair labor practice charges that the union had filed, which agreement was subsequently executed by the employer and the union; he offered to withdraw the election petition if the employer would agree to pay employees $1 less than union scale. *Id.* at 1365-66. These activities—which are far more extensive than anything Trump has shown here—did not make the union answerable for Wentworth's misconduct in the majority's view.[5]

Cases such as these are part of a solid trend of court and NLRB law rejecting arguments that zealous employee advocates are general agents of the union simply because they may work in close coordination with the union to advance common organizational interests. *See Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983) (noting that "[t]he test of agency in the union election context is stringent" and rejecting a finding of agency for "the most active 'union man'" because evidence established that the union's own organizer maintained communication with employees); *L & A Juice Co*, 323 NLRB 965 (1997) (employee's holding union meetings deemed inconclusive of agency status); *Cambridge Wire Cloth Co*, 256 NLRB 1135, 1139 (1981), *enfd*. 679 F.2d 885 (4th Cir. 1982) (card solicitation insufficient to show agency status); *Tennessee Plastics, Inc.*, 215 NLRB 315, 319 (1974), *enfd.* 525 F.2d 670 (6th Cir. 1975) (union's most ardent employee advocate during organizational campaign found not to be union agent, where union was represented on the spot by a full staff of agents led by an international union organizer who personally directed the campaign); *cf Yukon Mfg. Co.*, 310 NLRB 324,

[5] Trump does not cite or discuss *United Builders Supply Co.*

326 (1993) (noting that "there is no authority for the proposition that members of inplant organizing committees are per se agents of the Union that appoints them" and that such a finding would render a large swath of employees agents of the union for purposes of objectionable conduct.)

While ignoring the relevant caselaw, Trump trumpets a handful of cases whose facts differ markedly. It repeatedly cites *Bio-Medical Applications of Puerto Rico, Inc., supra,* 269 NLRB 827. There, the Board found that an employee was an agent of the union in the following unique circumstances. An election was held across three different facilities of the employer located in three separate cities in Puerto Rico.[6] The union enlisted the support of two employees employed at the Hato Rey facility to travel to the Mayaguez facility, where, in the presence of the union's organizer, these employees introduced themselves to the Mayaguez workers as "representatives" of the union. Later, one of the Hato Rey employees returned to the Mayaguez facility where he attended the pre-election conference and then stayed at the union's instructions in the waiting area near the polling place. There, he engaged in objectionable electioneering in violation of the *Milchem* rule. 170 NLRB 362 (1968). The fact that the Hato Rey employee was essentially a stranger to the Mayaguez facility, was identified as a "representative" of the union in the presence of the union officer, and was directed by the union's officer to stay in the room where he committed objectionable conduct were factors that rendered him an agent.

[6] These cities were Mayaguez, Ponce and Hato Rey. Each of these is located at different points around the island.

Trump also relies on *Bristol Textile Co.*, *supra*, 277 NLRB 1637. At issue there was a conversation overheard by others between employee Pirollo and his brother Albert where Albert threatened that "they" would slash the tires of any opposed to the union. Pirollo did not disavow the threat. The Board ruled that Pirollo was an agent of the union by virtue of the fact that he literally was the union's "only link" with employees. *Id*. at 277. The union's officer dealt "dealt exclusively" with Pirollo, calling him the "spokesman" because "he's the only one I really talked to." *Id*. at 1637. Pirollo himself confirmed that "he represented the Union" at the plant, and that that was how his coworkers viewed him. *Id.*

The Board and the courts have repeatedly distinguished *Bio-Medical Applications* and *Bristol Textile* in rejecting claims of agency status for organizing committee members. *See Mastec N. Am., Inc.*, 356 NLRB No. 110. n. 5 (Mar. 7, 2011)(distinguishing both cases); *Cornell Forge Co.*, *supra*, 339 NLRB at n.6 (distinguishing both cases); *Bj's Wholesale Club*, 319 NLRB 483, 509 n. 54 (1995)(distinguishing both cases); *Vernon Auto Parts Exch.*, 287 NLRB 168, 168 (1987)(distinguishing both cases); *Did Bldg. Servs., Inc. v. N.L.R.B.*, 915 F.2d 490, 496 (9th Cir. 1990)(distinguishing *Bristol Textile*); *N.L.R.B. v. Mattie C Hall Health Care Ctr.*, 816 F.2d 672 *1, 1987 WL 37010 (4th Cir. 1987)(Table)(distinguishing *Bristol Textile*). In fact, there appears not to be a single instance in which the Board has found agency status in reliance on *Bio-Medical Applications* or *Bristol Textile*. The significance of these cases lies chiefly in how *little* progeny they have.

Trump also cites *Pastoor*, 223 NLRB 451 (1976), a case that likewise constitutes a

footnote in the Board's approach to agency. There, the Regional Director recommended finding the union's committee members to be agents because they carried out various activities, including soliciting signatures on union authorization cards. *Id*. at 453. The Regional Director placed emphasis on the fact that committee members drafted the union literature that was at the heart of the objection, which the union merely reviewed and reproduced (which is not the case here, *see infra.*) *Id.* Given the many subsequent Board rulings rejecting the argument that solicitation of authorization cards constitutes evidence of agency, *Pastoor* cannot be said to represent current Board law in any event. *See Cornell Forge Co.*, *supra*, 339 NLRB n. 6 (distinguishing *Pastoor*); *Pierce Corp*., 288 NLRB 97, n. 51 (1988) (distinguishing *Pastoor*).

The fact that Trump relies on a handful of distinguishable Board cases while paying no heed to recent Board cases that have squarely addressed the question of agency in the organizing context reveals the severe flaw in its approach. That conclusion is bolstered when one considers that Trump leans heavily on Fourth Circuit precedent that the Board has explicitly rejected.

B. The Regional Director correctly rejected Trump's expansive agency inquiry because the Board has rejected the precedent upon which it relies.

Trump relies heavily on a trio of decisions from the Fourth Circuit Court of Appeals that, in disagreement with the Board, applied agency principles expansively to find unions responsible for the acts of committee members during organizing campaigns. Although Board member Oviatt voiced support for these in what effectively were dissenting opinions, the Board has never adopted them. The Regional Director correctly

rejected Trump's arguments.

In *Georgetown Dress Corporation*, *supra*, 537 F.2d 1239, the court found committee members to be agents of the union because they were "the union's only in-plant contact with the workers" and "the union's sole representatives in the organization effort." *Id.* at 1243, 1245. In *PPG Industries, Inc. v. N.L.R.B*, 671 F.2d 817 (4th Cir. 1982), the court expanded upon *Georgetown Dress*, and found that committee members were agents of the union despite the union is active presence; the court concluded that committee members were the union's "eyes and ears" within the plant and reported to the union about events which occurred in the plant during the election campaign. In *N.L.R.B. v. Kentucky Tennessee Clay Co*., 295 F.3d 436, 445 (4th Cir. 2002), the court found that committee members were agents because there was "hardly any participation whatsoever" by the union organizer assigned to the campaign, including not even traveling to the town where the plant was located "to meet with or attempt to organize the facility employees." *Id*. at 445.[7]

These decisions have been distinguished by both the Fourth Circuit and by other circuit courts sitting in review of Board rulings. *See Ashland Facility Operations, LLC v. N.L.R.B.*, 701 F.3d 983, 991 (4th Cir. 2012) (distinguishing *Kentucky Tennessee Clay* because the union there had "three employees who were actively involved in the organizing campaign, ran all organizing meetings, and called employees."); *N.L.R.B. v.*

[7] These decisions are factually distinguishable from the present one because the union's roles in those organizing campaigns were smaller than Petitioner's was here. But because Trump cites them supporting a more expansive view of agency than the Board has adopted, we shall address them as such.

Herbert Halperin Distributing Corp., 826 F.3d 287, 291 (4th Cir.1987) (distinguishing *Georgetown Dress Corp* and *PPG Industries* because in the case before it "the evidence shows that the professional union staff was heavily involved in the campaign")); *see Amalgamated Clothing & Textile Workers Union, AFL-CIO, CLC, supra*, 736 F.2d at 1566 (wherein D.C. Circuit Court of Appeals questioned *PPG Industries, Inc.*'s rationale that employees were "agents" of the union because they were its "eyes and ears," noting that the Board could reasonably find the test for union agency more stringent than for employer agency.)

The Board itself has repeatedly rejected the expansive view of agency that Trump sets forth in reliance on cases such as *Georgetown Dress Corp*. and its Fourth Circuit progeny. *See S. Lichtenberg & Co.*, 296 NLRB 1302, 1315 (1989); *Pierce Corp*., *supra*, 288 NLRB 97, n. 51; *Cambridge Wire Cloth Company, Inc*., 256 NLRB 1135, n. 18 (1981). It discussed the dispute most recently in *Advance Products Corp, supra*, 304 NLRB 496. There, Member Oviatt disagreed with the majority's decision that Frank was not an agent of the union. He wrote:

> Frank's duties included, among other things, answering employee questions and concerns about the Petitioner. He thus served as a conduit between the Petitioner and the employees. The Petitioner failed to assure employees that only its organizers, and not the IHOC, spoke for the Petitioner. In these circumstances, the presence of paid union organizers in the campaign does not preclude a finding that IHOC members had apparent authority to act for the Petitioner. Indeed, where an inplant organizing committee and union organizers work hand in hand— without a clear statement that only the organizers speak for the union— employees will reasonably understand that both are acting and speaking on behalf of the union. Here, as in *Georgetown Dress Corp. v. NLRB*, 537 F.2d 1239 (4th Cir. 1976), a decision with which I agree, the IHOC members in the eyes of other employees would appear to be representatives of the Petitioner and the

Petitioner authorized them to occupy that position.

Id. at 437. The panel majority rejected Member Oviatt's analysis:

> Frank's activities here were actually quite typical of IHOC members generally and most key union activists. Hence, our concurring colleague would, in effect, create a per se rule that such employees have apparent authority to act on behalf of union's conducting their respective campaigns, absent an express and clear statement by the union to employees that only the organizers speak for the union. Under our concurring colleague's view, apparent authority is assumed, and the union must explicitly repudiate it in order to avoid being charged with the actions of IHOC members and, presumably, other key union activists. This extension of Board law on agency is particularly unwarranted where, as here, union organizers were readily accessible to employees and the Union itself was actively orchestrating and conducting the campaign.

Id. at n. 3.

Subsequent to *Advance Products,* Member Oviatt continued to criticize the Board's rejection of his expansive agency analysis in *Windsor House C&D, supra,* 309 NLRB 693. There, in a sentence that Trump disingenuously quoted in its brief to the Regional Director as a statement of actual Board law, Member Oviatt argued that "[w]here the union encourages the establishment of an in-plant organizing committee and directs the committee's work, the organizing committee members are union agents when they proceed to do what the union has directed them to do." *Id.* at 694. Member Oviatt made that argument in concurrence in *Windsor House C&D* recognizing that the Board had *rejected* his position in *Advance Products*. *Id.* Although Trump has now backed off quoting what was effectively Member Oviatt's dissenting view as a statement of Board law, it continues to shop his theory without acknowledging that it is one that the Board has rejected. *See* Employer's Brief in Support of Request for Review ("Brief"), p. 24.

C. Applying the correct legal considerations, the Regional Director and Hearing Officer correctly determined that committee members were not agents of the Petitioner.

The Regional Director and Hearing Officer correctly weighed the relevant factors in finding that committee members were not agents of the Petitioner. There were two inter-related bases for their finding. First, the activities that committee leaders engaged in do not constitute indices of agency under clearly established Board law. Second, the Petitioner "itself was actively orchestrating and conducting the campaign," and thereby made its presence known to employees entirely independent of what committee members said or did. *Advance Products Corp*., 304 NLRB at 436.

1. Organizing committee members engaged in activities that the Board has ruled are not indices of agency.

By the time of the December election, the Petitioner's organizing committee consisted of 34 employees who worked in different departments of the hotel. Tr. 1905. Committee members helped in the organizing efforts by urging coworkers to sign authorization cards and petitions, distributing union literature, answering questions about the union, and inviting employees to speak with union organizers. The Board has consistently recognized that these are not indices of agency. *See Corner Furniture*, *supra*, 339 NLRB at 1922 (not conclusive of agency that employees organized meetings between the union and coworkers); *United Builders Supply*, supra, 287 NLRB at 1365-66 (not conclusive of agency that employees organized union meetings and invited coworkers to speak with organizers); *Advance Product Corp*., 304, *supra,* NLRB at 436 (not conclusive of agency that employees transmitted the concerns of their coworkers to

the union).

Participation on the committee was voluntary and any employee was eligible to join. Tr. 1905-1906. The only commitment employees made was a general pledge to use best efforts to organize their coworkers. They committed themselves to helping "achieve a just and permanent contract at Trump Las Vegas . . .for as long as it takes," to keep coworkers informed and involved, to identify publically as a leader, and to faithfully attend committee meetings. EX 13. This pledge was an aspirational commitment rather than any kind of contract. By its very terms, it bestowed no authority upon committee members. EX 13. Committee leaders held no position of authority within the union, and were not promised any position in the event that Petitioner became collective bargaining agent for Trump employees. Tr. 72; 357; 367; 1908. The Petitioner did not pay committee members; it did not reimburse their expenses; it did not provide them compensation in any form for their activities. Tr. 72; 367; 1444; 1570. Moreover, there is no evidence that the Petitioner ever communicated to employees that committee members held any privileged positions within the union.

Committee members identified themselves publically by wearing a red-and-white button approximately two inches in diameter that stated "Committee Leader." As such, they dedicated themselves to activities such as securing authorization cards from coworkers, passing out union flyers, urging their coworkers to wear buttons, and talking to coworkers about the union at the workplace. Tr. 72; 384; 413; 432; 516-517; 641; 716; 803-808; 868. In order to assure that workers were being spoken to with some consistency, each committee member had a list of employees whom he or she would take

special care to speak with. This so-called "list of 20" originally contained the names of twenty employees each of whom had signed union authorization cards. With the addition of more committee members over time, the "list of 20" ended up having names of only seven or eight employees. There is no evidence that any Trump employee was aware that he or she was part of any list of 20, nor evidence that committee leaders advertised the fact that they had such a list.

Trump's own witnesses made consistently clear that, insofar as they were aware, the role of committee members was limited to distributing union literature, persuading employees on the question of unionization, and distributing authorization cards. Magdiely Perez testified that she saw committee members post flyers on the walls and in the EDR; on a couple occasions saw them stand up and clap while chanting "union, union, union!" Tr. 432. Rosalia Albano testified that she saw committee leaders giving out flyers and trying to convince workers to join. Tr. 641. Rosa Salazar testified that she saw committee members offering cards for people to sign and giving out information as to how one could join the union, but that as far as she knew, they did "nothing else." Tr. 716. Natividad Ramirez generally discussed committee members trying to get her to sign an authorization card and talking about union buttons. Tr. 803-808. Luz Hernandez testified that the only activities she associated with committee leaders was handing out cards and buttons and talking about the union. Tr. 1369. Jose Ascencio testified that he saw committee members handing out flyers and trying to build their movement. Tr. 868. Susana Ramos testified that she saw committee members instigating coworkers, giving out papers, passing out cards, and arguing with people. Tr. 1162. Madison Gonzalez

testified she saw some employees wearing a red-and-white button and others wearing a gold button, but she did not attach any meaning to the distinction. Tr. 333. Vania Mariscal testified that she observed committee members passing flyers and speaking with people; she opined that it seemed that their role was simply to "harass people a lot" and to "bother you during lunch." Tr. 516-517.

Not a single hotel witness testified that she or he read anything, heard anything, or saw anything that gave them to understand that committee members were more than coworkers who zealously supported the union.

2. The Petitioner's organizers were prominently visible throughout the campaign.

The Petitioner maintained a permanent presence of its own officers and staff throughout the organizing campaign. From June to December, there were eight to ten organizers working full-time, including Organizing Director Jose Pineda, Ramiro Nava, Mercedes Castillo, Marta Ramirez and others. Tr. 1911-1914. In addition, the Petitioner enlisted an additional 50 organizers to assist during two three-week periods prior to the election scheduled in June and the election rescheduled for December. Tr. 1912-1913; 2092. Thus, there were roughly twice as many union organizers as committee members working through substantial portions of the campaign. These organizers engaged in activities that made it amply clear that the Petitioner "had its own spokesman separate and apart from union activists." *United Builders Supply*, *supra*, 287 NLRB at 1365; *Foxwoods Resort Casino, supra,* 352 NLRB at 771 (noting that as many as 50 organizers were assigned to bargaining unit where over 2,100 employees voted).

The house visit was a main tool for union organizers to make face-to-fact contact with Trump workers. During these visits, organizers spoke directly to workers; distributed literature about the union, and collected information about the workers' button use and support for the union. Tr. 1916-1917; 1938; 1994. The Petitioner conducted close to 400 successful house visits with Trump employees between June and December, "success" being defined as the establishment of face-to-face contact no matter how long the conversation. Tr. 1933.[8] For every successful house visit, organizers made several more attempts to visit workers who were not home; on these occasions, organizers would leave messages where possible that they had come and would come again. Tr. 1936. On a few occasions, committee leaders would accompany a union organizer on a house visit, but the large majority of house visits were conducted by pairs of organizers who did not work for Trump. *See Foxwood Resort Casino, supra,* 352 NLRB at 772 (fact that "members attended home visits . . . in the presence of a union staff member not indicative of agency.")

Trump's witnesses clearly did not agree with Trump's self-serving argument that home visits produced only "limited results." Brief, p. 25. Rather, they consistently acknowledged that they had been visited at their home by a union organizer on multiple occasions. Salazar testified that she was visited at her house three different times by organizers. Tr. 749-753. Pantoja testified she was visited on two separate occasions. Tr.

[8] Many of the visits lasted some 45 minutes or so. Tr. 1937. But the length and quality of the conversation is irrelevant. Even if the employee declined to speak with the organizer, it is the fact that the organizer was there knocking on the door that established the union's presence in the campaign.

777. Natividad Ramirez testified that union organizers visited twice. Tr. 812. Perez testified that she was at the house of a friend when a union organizer arrived there. Tr. 430. Beverly Contreras testified that she was visited "many times" by union organizers. Tr. 2752. Her sister Jacklyn Contreras was visited enough times that she threatened she would shoot an organizer in the head if one showed up again. Tr. 2749.[9]

Trump's managers also acknowledged that Petitioner's organizers were actively visiting employees at their homes. In mandatory meetings held immediately prior to the election, General Manager Brian Boudreau told employees that rejection of the Petitioner would bring "peace when we are at home with our families and loved ones." PX 18. Trump distributed anti-union campaign material describing the union as "expert" at "*repeatedly harassing you at home*." PX 20 (emphasis added). It is inconceivable that Trump would have reacted with such stridency to home visits were they producing "limited results" as Trump now claims.

i. Petitioner conducted regular meetings with employees.

In addition to house visits, union organizers held regular meetings with workers in the parking lot of the Macy's located across the street from the Hotel. Tr. 1949. These meetings were held throughout the critical period, and occurred practically daily in the weeks preceding the December election. Tr. 1950. Pineda himself was present at Macy's three or four times per week, and other organizers were present on other days. Tr. 1950. During these meetings, organizers met face-to-face with workers who had

[9] The Employer disciplined Contreras for this threat, but did not discharge her because she only threatened to shoot union organizers, not her co-workers. Tr. 2775-2776.

questions about the union. Tr. 2010-2011. *See Advance Products Corp., supra*, 304 NLRB at 436 (organizers were directly accessible to employees through union meetings).

ii. Petitioner drafted and distributed literature.

Petitioner drafted the union literature that was distributed to employees throughout the campaign. The literature was prominently branded with the Culinary Workers Union and Bartenders Local 165 symbols. EX 2; PX 5. Petitioner's Communication Director Bethany Khan was responsible for creating leaflets and other material in consultation with union organizers. Committee leaders never drafted or approved the content of union literature. Tr. 1719; 1722; 1913. *See id.*, (committee members "did not decide or approve the contents of union literature.")

Khan worked with the union's staff and researchers to determine the content of the handbills. Tr. 1726. The handbills made clear that the Petitioner was speaking to employees as an institution separate from any employees at the workplace. Thus, the literature explained the benefits Petitioner had achieved on behalf of workers at other worksites in Las Vegas as well as in Canada; it featured statements from union members who did not work at Trump; it publicized facts about Donald Trump's earnings from the hotel based upon his fillings as presidential candidate; it criticized Trump's position that it could not afford the cost of union benefits because it does not operate a casino. Tr. 1725-1729.

In several of its leaflets, the Petitioner featured the photos of committee leaders and urged employees to "Talk to your committee leaders to learn more about your right to organize and take part in union activities," or "your right to participate in Union

activities and the Union election." As the Hearing Officer correctly found, these invitations did not bestow any general agency upon committee members to speak on behalf of the Petitioner, nor could they be seen by employees to have done so. It is certainly true that, in the face of Trump's aggressive anti-union campaign, the Petitioner wanted engender discussions among employees about Section 7-protected activities, Section 7 rights, including the right to wear a union button. Trump had illegally suspended button-wearers in the past which resulted in their reinstatement. But vaguely encouraging employees to speak to committee members about subjects as indefinite as their "*right to organize*" and to "*participate in Union activities*" did not convert committee members into any kind of official spokespersons for the Petitioner.[10]

In its own campaign propaganda, Trump portrayed the Petitioner as a third party outsider and ignored the employee-committee altogether. It claimed that "since 2007, the Union lost nearly 200,000 dues-paying members." PX 20. It claimed that the union had agreed to make concessions to obtain a contract in Toronto, stating that "UNITE HERE traded what *employees* wanted to get what ***the union*** wanted." (emphasis in original). PX 21. It made a presentation to employees that drove home its argument that the union is an *outside* entity, claiming that "UNITE HERE received $66 million to establish the Nevada Health Co-op . . . The co-op paid UNITE HERE $1.6 million in 'consulting fees' according to tax documents." PX 17, p. 37. Any employee reviewing Trump's material

[10] On a different leaflet, the Petitioner stated: "Today, June 5, the Union will file an election with the National Labor Relations Board (NLRB), as recommended by the organizing committee." PX 2, p. 2. The fact that the Union may have considered a "recommendation" of the organizing committees showed that the committee could have input, but the Union was the one that made the actual decision itself. That is the *opposite* of agency.

would understand that the Petitioner was no mere alter ego of the employees who supported it. Trump was correct in that regard.

While committee members distributed literature inside the workplace, Petitioner also sent its leaflets and other campaign material *directly* to employees via text message and email. Tr. 1731; PX 6 & 7. Khan built a text message list of some 300 recipients by the end of the campaign. Tr. 1733. In addition to texting copies of the union's leaflets, she texted links to the "Make America Great Again, Start Here" video it produced as well as television coverage of union rallies. Tr. 1736; PX 6, p. 4. Through this texting campaign, the Petitioner made patently clear that it was an active and independent force, and did not merely rely on committee members to disseminate its message.

Petitioner also emailed its leaflets and campaign announcements. PX 7. Although the "open rate" for emails was less than for text messages—making email a less effective means of communication—employees nonetheless received the email as marked *from* "Culinary and Bartenders Union." PX 7. Therefore, whether the recipient chose to reach the email or not, he or she knew it was the Petitioner that was communicating.

In addition to texting and email, the Petitioner maintained a permanent presence on social media throughout the organizing campaign, distributing messages via Twitter and posting information about the campaign on its Facebook account and homepage. PX 8.

iii. Petitioner organized rallies.

The Petitioner organized campaign rallies on a scale consistent with its prominence as a foremost political institution in Nevada. The first of these was a press

conference held August 19 with then-presidential candidate Governor Martin O'Malley outside the hotel. Tr. 1749. Two days later on August 21, Petitioner staged a massive protest at the hotel that was attended by thousands. CWU Secretary-Treasurer Geoconda Arguello-Kline spoke, together with various other union officials, politicians and members of clergy. PX 9, tab 2. On October 12, Petitioner organized a third rally that featured an appearance of former Secretary of State Hillary Clinton. PX 9, tab 3. Aguello-Kline again spoke on behalf of the Petitioner, as did CWU President Ted Papageorge and UNITE HERE International Union vice president Maria Elena Durazo.

The fact that no less a public figure than Hillary Clinton attended Petitioner's campaign rallies made it patently clear to everyone that the Petitioner was orchestrating the campaign. Committee members attended these rallies—as did many Trump employees generally—but they had no role in deciding to stage them or in organizing them. Tr. 1767. A committee member may have stood on the stage, but there is no evidence that she or he was presented as any kind of official spokesperson for the union. Only Arguello-Kline and Khan made statements in an official capacity on behalf of the union during press coverage of the events. If employees spoke, they spoke as individuals and were identified as such. Tr. 1714. *See Foxwoods Resort Casino, supra*, 352 NLRB at 772 ("[T]he Union's media specialist worked with employees on how to present their stories, but there is no evidence that those stories were presented as anything other than employees' personal views.")

Petitioner produced a campaign video based on the August 21 rally entitled "Workers to Mr. Trump: Start Here." PX 9, tab 2. It produced a second campaign video

based on the October 12 rally entitled "Trump Workers: We Support You." *Id.*, tab. 3. Officials who spoke on behalf of the Petitioner such as Arguello-Kline, Pappageorge, and Durazo were separately identified by their title. The first video featured several workers who were identified as Trump employees and again simply shared their personal reasons for supporting the Petitioner. Of course, nothing in any of these videos contained any threatening statement, and nothing in them could be interpreted to suggest that the Petitioner granted employees authority to make any threatening statements on its behalf. It was quite clear through *all* its communications that, when the Petitioner spoke, it did so professionally and lawfully.

The media also covered anti-union employees who attended the August 21 rally to criticize the Petitioner; these employees made clear in the course of their rhetoric that the union was an "outside" entity. PX 9, tab 1; PX 27. For example, anti-union proponent Tommy Tomasello appeared on local television news coverage to say "The Culinary Union went on to say that over 500 employees would like union representation. That's simply inaccurate. We don't feel we need third-party representation." PX 9, tab. 1. These media reports also clearly identified Arguello-Kline as spokesperson for the Petitioner. All this made further obvious that the Petitioner was prominently present as an institution separate from the employees who supported it.

Based on all the foregoing, the Regional Director and Hearing Officer were correct to find that the Petitioner's consistent presence throughout the campaign weighed heavily in favor of a finding that committee persons were not its agents. Employees were palpably aware of the union's presence at all times because its organizers "were readily

accessible to employees and the Union itself was actively orchestrating and conducting the campaign." *Advance Products Corp*., *supra*, 304 NLRB at 436.

3. Trump's analysis is based on an incorrect standard for agency as well as a distortion of the facts.

Trump argues against the Regional Director's action by inviting the Regional Director to adopt the Fourth Circuit's analytical framework and to apply it to facts that Trump selectively culls from the record. Trump would have the Regional Director find "agency" in the mere fact that the union coordinated *at all* with committee members to organize employees inside the workplace. Relying primarily on the logic of *PPG Industries, Inc.*, 671 F.2d at 819, to argue that committee leaders were the union's "eyes and ears" inside the plant, Trump claims the following facts supports a finding of agency: 1) the fact that committee members "formally" committed to work for the union through an aspirational pledge; 2) the fact committee members "faithfully" attended weekly meetings; 3) the fact the Petitioner encouraged committee members to talk to their coworkers; 4) the fact that Petitioner identified committee members on leaflets as persons from whom employees could discuss union activities; 5) the fact that one or two committee members stood on the dias during the two rallies that the Petitioner organized; 6) the fact that committee leaders spoke to the press, albeit in their capacities as Trump employees and regarding their own personal view on the organizing; 7) the fact that committee members appeared in union videos, albeit again in their capacities as Trump employees and discussing their own personal narratives; 8) the fact that union organizers were not permitted inside the hotel 9) the fact that committee members served as one

conduit among others for communication between union representatives and employees; 10) the fact that committee members reported information to the union about the employer's campaign or about employee sentiments 11) the fact that committee members assertedly performed the "lion's share" of campaigning.

To argue its case for agency, Trump minimizes (as it must) the overwhelming evidence establishing that Petitioner's organizers orchestrated the campaign, made strategic decisions regarding it, dedicated literally thousands of work-hours to it, and were visibly present throughout it. It is worth noting that Trump borrows its jingoistic "lion's share" mantra from the Fourth Circuit's use of the phrase in *Kentucky Tennessee Clay Co*., *supra,* 295 F.3d at 443. But there, the union's organizer relied "s*quarely* and *exclusively*" on two employees to perform all of the union's organizing work: other than attending three meetings that those employees had organized, "there was no evidence that [the organizer] or any other professional organizer ever obtained a single signature on an authorization card, attempted to visit the facility or to speak to employees on its outskirts, handed out a single pamphlet, or attempted to initiate contact with a single employee." *Id.* (emphasis added). Trump is simply grasping at straws by suggesting that this was the case here.

One can only accept Trump's theory of agency if one accepts the Fourth Circuit's expansive agency approach embodied in *PPG Industries, Inc*. as a proper statement of Board law. But *PPG Industries, Inc.* is incompatible with Board's rulings that have rejected agency arguments cases where unions relied *even more substantially* upon committee leaders to carry out their campaigns than the Petitioner relied upon the

committee here. *See Corner Furniture Discount Center, supra,* 339 NLRB at 1123 (employee leader was not an agent although he organized campaign meetings at which he spoke, and otherwise "played a leading role in the campaign"); *Advance Products, supra,* 304 NLRB at 536 (committee members discussed the union with coworkers and answered their questions; distributed the union official's business card to coworkers; distributed union buttons, hats, shifts, and literature; and kept the union informed of events that took place within the plant); *United Builders Supply Co., supra,* 287 NLRB at 1365 (employee organized some 18 to 25 meetings and invited employees to attend; boasted that he would be made shop steward if the union won the election; offered to withdraw the representation petition if the employer would agree to a pay increase; negotiated a settlement agreement with employer over an unfair labor practice charge filed by the union; and other acts); *Foxwood Casino, supra,* 352 NLRB at 772 (union's media specialist worked with employees to help them "tell their stories" to the press, but stories presented as the employees' own personal views); *see also Amalgamated Clothing and Textile Workers Union, AFL-CIO, supra,* 736 F.2d at 1565 (affirming Board's ruling that member of in-house organizing committee were not union agents despite that they "drafted, endorsed and distributed leaflets, solicited employees to join the union, wore pro-union insignia, and even made visits to the homes of fellow employees to urge them to support the union.")

The most that Trump established was that the committee was *one* conduit through which the Petitioner communicated with and organized employees through its active management of the campaign. That is not the standard for agency under Board law. The

Regional Director correctly determined that Trump failed to meet its burden on this issue. The request for review should be denied.

II. Trump failed to prove that objectionable conduct occurred and that the election results should be overturned.

The Regional Director correctly adopted the Hearing Officer's recommendation that each of Trump's objections should be overruled. Her recommendation was based on a detailed consideration of the evidence and a proper application of relevant legal principles.

Trump objects to the Hearing Officer's credibility findings. But it is the Board's established policy not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces that they are incorrect. *PPG Indus., Inc. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Uaw*, 350 NLRB 225, 226 (2007); *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957). The D.C. Circuit has affirmed the NLRB's approach, admonishing that a hearing officer is "uniquely well-placed to draw conclusions about credibility when testimony [is] in conflict," and is "also far better situated than are we to draw conclusions about a matter as ephemeral as the emotional climate of the [workplace] at the time of the election." *Amalgamated Clothing & Textile Workers Union, supra,* 736 F.2d at 1563. Thus, a hearing officer's "credibility determinations may not be overturned absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible." *Id*. (internal quotation omitted). *See also E.N. Bisso & Son, Inc. v. N.L.R.B.*, 84 F.3d 1443, 1444-45 (D.C. Cir.

1996)

Trump repeatedly attacks Carmen Llarull's credibility as a smokescreen to cover the fact that the Hearing Officer found Trump's own witness to lack specificity and credibility on crucial issues. The Hearing Officer correctly rejected Trump's decoy. She had the opportunity to evaluate the reliability of Trump's witness firsthand as they meandered haltingly through their testimony, contradicting themselves and one another along the way. While Trump argues that its witnesses' inability to recall specifics was no less than the Petitioner's (an entirely untrue proposition), Trump forgets that *it* bore the burden of proof to present specific, credible evidence in favor of its objections. It failed to do so. The Hearing Officer's credibility determinations were correct.

As we hereafter discuss, the Regional Director/Hearing Officer's rulings were correct and there is no basis for review.

Objection 1

The Regional Director/Hearing Officer properly overruled Objection 1 based upon a straightforward application of Board law to the facts. Trump mainly complains that the Hearing Officer did not credit the version of its election observer Magdiely Perez, a self-evidently biased observer who provided irreconcilably different accounts of what she claims happened at different times. Trump failed to demonstrate that the Hearing Officer's findings were clearly erroneous, or that there exists any other basis for review.

Contrary to Trump's assertions, the Hearing Officer did not find that Llarull made any comment urging a voter to vote a particular way. Brief, p. 41. Rather, she found only that Llarull "must have said *some comment* about the left side of the voter to at least

one voter." Report, p. 8 (emphasis added). She determined that Llarull made this comment in response to a voter who complained that the ballot was difficult to read, a circumstance that the Hearing Office found "not inconceivable." *Id.*, 7.

Trump argues that the Hearing Officer committed clear error by not embracing Perez's account of what happened. But even Trump acknowledged the bewildering contradictions in Perez's testimony:

> Granted, Perez's testimony at times was inconsistent with an earlier affidavit. (HOR 8-9). She was also inconsistent in how loud the left comments were, confused the voters to whom Llarull made the "left" comment, and, since the voter she misidentified spoke English, claimed that the comment must have been said in English.

Brief, p. 38. But this should not matter, Trump argues, because "Perez, upon hearing her affidavit, readily agreed that Linder was the second voter, that she had confused the two, and that the left comment was in Spanish as she originally stated in her earlier affidavit, written shortly after the events occurred." Brief, p. 38. In other words, Trump argues that the Hearing Officer should have credited Perez's credibility account because, when confronted with her prior inconsistent statement, she immediately abandoned her detailed testimony in favor of an entirely different account.

This is absurd. Perez did not merely forget details of her testimony. She testified with specificity on *both* direct and cross examination that Llarull gave instructions in English to an employee named Snowden, and then moments later, denied that Llarull gave *any* instructions in English to Snowden but instead gave instructions in Spanish to an employee named Linder. Perez called this just a "detail." Tr. 496; 493-496. But that

"detail" was merely *all of her testimony* concerning the incident. Perez's about-face did not restore her credibility, but rather destroyed it.

But if that were not enough, serious anomalies remained even after Perez changed her story. One such discrepancy was how it could be that, according to Perez's testimony, Llarull blurted out "left, left" so loudly that Aleman and "Snowden-Linder" (for lack of a more certain name) could have heard her words across the room, while Anzaldua, who was positioned just five feet away from Llarull between her and the employees, heard *nothing*. Tr. 73. According to Perez's testimony, Aleman had already collected the ballot from Anzaldua, and was near the first ballot box when Llarull supposedly declared "left, left" in a voice that Perez agreed was loud enough to be clearly audible: "she didn't say it low." Tr. 479. By this time Llarull and Aleman were separated by several feet and Anzaldua was between them. Tr. 441-442. There was nobody else present either at the observer's table, around Anzaldua or at the ballot box. Tr. 476-477. But Anzaldua, who was proficient enough in Spanish to understand "left, left" and who any rate would have taken notice of a comment that Llarull launched across the room to a voter, heard nothing. Tr. 266; 273.

The same problem arises with respect to Llarull's asserted statement to Snowden-Linder. Again, Anzaldua must have been between Llarull and Snowden-Linder at the time Llarull supposedly said "left, left" because she had picked the ballot up from him. Thus, once again, Llarull must have said "left, left" in a sufficiently loud voice for everyone in the room to have heard, if Snowden-Linder heard it from where she was standing. But, once again, the only one who heard Llarull make the supposed statement

was Perez, an anomaly that simply defies expectation.

But the mystery does not end there. In her December 10 affidavit, Perez declared that Llarull made the supposed statements "*quietly to each employee while looking down at the table. I could tell she was trying to keep me from hearing it*." Tr. 495 (emphasis added). Here again, Perez's account is hopelessly contradictory. Llarull could not have said "left, left" loudly enough for Aleman and Snowden-Linder to have heard it across the room as they approached the voting booths, yet quietly enough so that Perez—who was seated immediately next to her—might not hear it.

At this point, it was anyone's guess which account Perez stood by. But neither can be true. If Llarull said the words loudly enough so that employees standing near the ballot boxes could have heard them, then Anzaldua would have heard them also (and Perez's declaration would be false). If Llarull stated the words looking down and trying to keep Perez who was seated just to her side from hearing them, then it defies belief that anybody in the room heard the words at all (and Perez's testimony would be false).

The Hearing Officer was entirely correct to reject Trump's version of events. Crediting Perez's incomprehensible story to defeat the will of a majority of employees who voted in favor of union representation would make a mockery of the Board's electoral processes. As it was, the Hearing Officer was overly charitable in finding that Llarull "must have made some comment about the left side of the ballot" when the evidence did not reliably support even that finding.

The Regional Director/Hearing Officer's application of Board law to the credited findings was also correct. *See Boston Insulated Wire & Cable Co.*, 259 NLRB 1118,

1118-1119 (1982), *enfd*. 703 F.2d 876 (5th Cir. 1983); *Sir Francis Drake Hotel*, 330 NLRB 638 (2000) (brief conversation between observer and five or six employees did not provide sufficient grounds for setting aside the election); *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195 (2004) (observer's sporadic smiles and thumbs up urging employees to vote for union did not rise to level of objectionable conduct); *compare Milchem, Inc*., 170 NLRB 362, 362 (1968)(prolonged conversations while employees were waiting in line was objectionable). The Board has never adopted a rule that any stray comment by an election observer during voting constitutes grounds for overturning an election, and even if Llarull's comment were somehow construed as electioneering, it was entirely insufficient to have had any meaningful impact on the election. Decision, 4-5.[11]

Trump makes two other arguments that are equally flawed. First, Trump argues that the Regional Director/Hearing Officer erred in not finding that Perez disseminated some version of her story to other employees. This of course begs the question: even if Perez *had* disseminated her tale that Llarull said "left, left" while looking down at the table in a voice too quiet to have been heard by any employee, then the fact of any dissemination is irrelevant because the conduct is not objectionable. Moreover, the Hearing Officer properly discounted Perez's testimony that "maybe" she mentioned Llarull's supposed statement to "some" employees as too vague to constitute reliable

[11] In contrast, in *Brinks, Inc.*, 331 NLRB 46 (2000), the union observer directly instructed four employees how to vote and these comments were disseminated, and he gave a number of other employees a "thumbs up" signal. He did all this even after the Board agent admonished him not to do so, creating the appearance the government could not control the election. None of this is present here.

evidence of dissemination.[12]

Trump also quarrels with the Regional Director/Hearing Officer's rejection of its claim that Llarull was using her cellphone throughout the election. The Hearing Officer correctly gave this no weight. First, Objection 1 says *nothing* about any claim that Llarull was using her cellphone. The Objection states:

> During the election session held on December 4, 2015 between 6 AM and 9 AM, the Union's agent, observer and organizing committee member Carmen Llarull told not less than two employees to "mark the left" (vote yes). Llarull's instructions were overheard by the Hotel's observer who informed the Board agent. The Board Agent did not speak Spanish, thus was unable to monitor Llarull or know what she was saying. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and interfered with their ability to exercise a free and reasoned choice in the election. The Region's failure to staff the election with a second Spanish speaking Board agent to monitor and prevent Union observers from direction employees to vote for the Union also tainted the election results.

It is preposterous to read this objection as encompassing a claim that Llarull also engaged in objectionable conduct by using her cellphone during the election, but such is Trump's argument. Second, not only does the contention fall outside the scope of the objection, it serves only to undermine further Perez's credibility: she did not report the cellphone allegation to the Board agents during the voting session; she did not report the allegation

[12] As if Perez's credibility problems were not enough, the Employer presented Natividad Ramirez's testimony in purported support of its claim that Perez disseminated what she pretends she heard. Tr. 824. But Ramirez testified that Perez told her that Llarull made the "left, left" comment to two employees *who still worked at the hotel*; Llarull did *not* make the comment to the employee whom Perez had challenged as no longer working at the hotel (*i.e.* Aleman). Tr. 842-843. Now we have *yet another account*! That is obviously why Trump ignores in its Brief what it hoped would be evidence of dissemination. It is merely further evidence that Perez's story changes from instant to instant.

to Trump's attorney immediately after the voting session; and the claim does not appear in the affidavit she signed on December 10. Third, even if one credits Perez's testimony completely, she only says she saw Llarull "check" her cellphone. Tr. 459. She did not see Llarull *use* her cellphone to send or record information. Tr. 499. Trump provides no legal authority to support the proposition that such conduct is objectionable.

The Regional Director/Hearing Officer correctly overruled Objection 1. Trump presents no basis for reviewing that decision.

Objection 2

The Regional Director/Hearing Officer correctly rejected Objection 2, which alleges that committee members acting as "union agents" engaged in surveillance by standing in an elevator lobby located down the hall way from room where the election took place. The Hearing Officer found that certain employees including one committee member identified as Jeffrey Wise sat or stood in this lobby for brief periods at various times.

At the outset, the Hearing Officer correctly applied the standard for third-party conduct rather than party conduct in determining that the brief presence of employees in the elevator lobby did not create an atmosphere that rendered a fair election impossible. Not only did Trump fail to prove that committee members were agents of the Petitioner as a general matter, Trump presented no evidence that the Petitioner said or did anything that would give employees the specific impression that it had stationed employees in the elevator entrance to observe on its behalf. *Compare Bio-Medical Applications of Puerto Rico, Inc*., *supra*, 269 NLRB at 829 (union officer instructed employee agent to wait in

area adjacent to election room that Board agent had declared to be a no-electioneering area); *see United Builders Supply Co*., *supra*, 287 NLRB at 1365 (evidence establishing limited actual or apparent authority did not establish agency with respect to the alleged misconduct.)

The Hearing Officer was also correct that, even if Trump had established that committee members were agents, the evidence that it adduced in support of this objection failed to establish coercive or objectionable conduct. The Board has ruled that the "[p]resence [o]f a union representative in the vicinity of the polls] alone, in the absence of evidence of coercion or other objectionable conduct, is insufficient to warrant setting aside an election." *C & G Heating & Air Conditioning, Inc. & United Ass'n of Plumbers & Pipefitters, Local 777*., 356 NLRB No. 133, 2011 WL 1321651 (Apr. 6, 2011) (citation omitted); *Parkview Cmty. Hosp. Med. Ctr. Employer & Serv. Employees Int'l Union, United Healthcare Workers-W. (Seiu-Uhw) Petitioner*, 21-RC-121299, 2015 WL 413882, at *2 (DCNET Jan. 30, 2015) (union official's presence outside of the building where the polling occurred, absent evidence of coercion or other objectionable conduct, was insufficient to warrant setting aside election); *Aaron Med. Transp., Inc. Employer & Hudson Cty. Union Local 1 Amalgamated Petitioner*, 22-RC-070888, 2013 WL 3090117, at *1 (DCNET June 19, 2013) (mere presence of union agents in the parking lot and sixth floor of the Employer's premises, without more, did not constitute objectionable conduct sufficient to overturn the election.); *Boston Insulated Wire & Cable Co*., 259 NLRB 1118, 1119 (1982) (electioneering by union agents 10 feet from polling place was not objectionable), enfd. 703 F.2d 876 (5th Cir. 1983).

Trump argues that elections must be set aside wherever union agents position themselves in an area where employees "must pass" on their way to vote. It cites *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981 (D.C. Cir. 2001) for this proposition. *Nathan Katz Reality* is irrelevant. The D.C. Circuit there found that union organizers had engaged in electioneering within a designated no-electioneering zone established by the Board agents conducting the election: they sat in a car motioning, gesturing, and honking as employees approached the polling area. Although the employees were not waiting in line to vote so as to trigger application of the *Milchem* rule, *supra*, 170 NLRB at 362, the court found that the electioneering substantially impaired the exercise of employee free choice because it had been conducted in a designated no-electioneering zone in defiance of Board agent instructions. 251 F.3d at 981 (citing *Overnite Transp. Co. v. NLRB*, 140 F.3d 259 (D.C. Cir. 1998). Here, even assuming *arguendo* that one or more of the employees standing in the elevator lobby were union agents, they did not engage in the kind of visible electioneering for a continuous period of time that the D.C. Circuit found objectionable in *Nathan Katz Reality*. Nor did they defy the Board agents' instructions by staying within an established no-electioneering zone. Employees who saw their coworkers in the lobby landing would have no basis to conclude that they were present for any coercive purpose. Once again, Trump seeks to aggrandize the meagre facts at its disposal to fit within an inapposite legal framework. The Regional Director properly overruled Objection 2.

Objection 4 and 13

A. Facts

1. Objection 4(a)—Vargas

Objection 4(a) arises out of a series of interactions Celia Vargas and Tommy Tomasello and his cohorts on the other. Tomasello was a leader of the anti-union employees. He was featured in a television report speaking against unionization. PX 9, tab 1. He was the asserted author and sponsor of a website entitled trumpunionfree.org, which served as a mouthpiece for attacks against the union. PX 12. He appeared in company-produced literature speaking against the union. EX 44.[13] He distributed company-produced literature challenging the union to sign a written guarantee about the benefits it would provide. PX 23.

Despite these activities, Tomasello was not known to Vargas, Llarull and other committee leaders. He worked as a doorman, and apparently had little contact with housekeepers. Thus, when Tomasello appeared on December 3 in the EDR wearing street clothes and introducing himself as "Mohammed" (with obvious sarcasm), Vargas did not even know who he was. Tr. 1591; 2302.

The video evidence supports Vargas' account of events. Tomasello arrived in the EDR shortly after 12.30 p.m. He approached union supporter Karla Menjivar, put a copy of the "guarantee" flyer in front of her, and made a demonstrable comment about it. EX

[13] He is quoted in company propaganda stating: "Currently, the relationship built along my years in this Hotel, from Mr. Baudreau and across all departments has been and is a positive one. Which provides open communication and helps resolve issues. I believe that a union will only hurt such relationship and the environment in which we work. If you want to protect what you have today, please vote NO" EX 44, p. 11.

37 at 12.31.40. He then circulated around the EDR, laying handbills on tables, and commenting to workers. At 12.33.40, Llarull also began handbilling, and Tamosello had words with her, gesticulating forcefully with his hand. *Id.* at 12.33.40. He continued speaking to employees at various tables. He pointed forcefully towards the adjacent table where committee members were sitting as he made comments. *Id.* at 12.35.52. Vargas entered the EDR at about 12.17 p.m., after serving herself food, sat down at the table where several committee members were seated. *Id.* at 12.40. Tomasello continued to circulate, and then sat down at the adjacent table with a stack of his handbills that he picked up and put down. *Id*. at 12.41. After a few moments, he started speaking with apparent force to employees seated nearby, gesticulating with his hands. 12.43. He then alternated thereafter between sitting quietly, agitated, and speaking at various time to employees. *See* 12.49.40; 12.52.45; 12.52.58.45; 1.01.48; 1.02.30. Just before 1.03 p.m., Vargas and other committee members got up and left the area; just before 1.09 p.m., Tomasello did as well; about 30 seconds later Vargas and returned from the same direction Tomasello had gone. It is not possible to see what interaction if any occurred outside the area covered by the surveillance camera. Just after 1.12 p.m., Tomasello returned to the table where he had been sitting. He placed the spray bottles onto the table as he sat down. Vargas saw this, and she stood up and took a photograph. 1.12.35.[14]

Contrary to Trump's argument, Vargas' testimony was consistent with the video

[14] Trump suggests that Vargas's credibility is in question because the photos in evidence and that Vargas said she took were apparently taken by Llarull, not Vargas. That raises no credibility issue. Vargas forthrightly acknowledged that she took photos. Whether she recalled which photos she took has no bearing on her credibility.

evidence and properly credited by the Hearing Officer. Vargas testified that when she was about to work, Tomasello had shown her a paper and told her to sign it. He would not give her a copy. Tr. 1594.[15] Later, when she came in to eat, she saw Tomasello walking around the cafeteria and then sit down. *Id*. She testified that Tomasello was making insulting comments to the effect that union supporters did not know what they were talking about because they didn't speak English and that he had gone to university. Consistent with this, the video evidence showed that Tomasello continued to speak while seated, gesticulating towards the table where Vargas was seated.

Vargas credibly testified that she took the photos because housekeeping management had told her and other housekeepers that chemical bottles should not be set on eating surfaces in the EDR as it violates public health regulations and could result in a fine to the employer. She found it ironic that "Muhammed" would violate a safety rule that housekeepers could be punished for, particularly in light of the fact he claimed to be a university student and know more about the law than Vargas and other committee members. Tr. 1595. Strong corroborating evidence is found in the fact that Tomasello acknowledged that he is indeed enrolled in a university. Tr. 1309. Vargas would have no way of knowing this had he not said it.

Later that afternoon, just after 4.30 p.m., Vargas returned to the EDR for a break.

---

[15] Trump argues that the video evidence did not show Tomasello offer Vargas one of his papers. Brief, p. 50. But Vargas testified that he demanded she sign the paper "as I was about to work." Tr. 1594. This indicates that this conversation took place at an earlier time, and not necessarily on camera. Moreover, Vargas later had a heated conversation with Tomasello in the EDR, and if she misremembered details of which specific words he said when, that does not undermine her credibility.

EX 21 at 4.36.45. Tomasello had already been engaged in a confrontation with Llarull and other committee members by that time when Vargas arrived (described below). Tomasello was taunting the workers about taking photographs of him, saying he looked handsome. Vargas showed Tomasello the photograph she had taken. She explained that she had taken it not because he was handsome but because it showed that he was not as smart as he thought he was: he had put toxic cleaning agents on a table in violation of company rules, exposing the company to the risk that the Department of Health might fine them. Tr. 1596-1596. She did not threaten to report Tomasello to "OSHA" or any other agency. That was Tomasello's invention.

Trump argues that the Hearing Officer erred in crediting Vargas' credibility over Tomasello's with respect to matters in dispute. The Regional Director properly adopted the Hearing Officer's credibility finding. In addition to the fact that Vargas' testimony was detailed, forthcoming and straightforward, Tomasello's credibility was severely undermined because he obviously tried to downplay his role in the events. For example, he denied that he made sarcastic comments at Vargas, Llarull and others as he sat in the EDR around 4.30 p.m., but Madison Gonzalez—another anti-union employee who was seated at the table—acknowledged that Tomasello was being sarcastic. *Compare* Tr. 340 with Tr. 1284. Moreover, while Tomasello tended to portray himself as acting merely on principle, the surveillance video showed him repeatedly approaching pro-union workers, standing next to them at close proximity in a portentous manner, and acting

provocatively.[16] Finally, other aspects of Tomasello's testimony were not creditable. For example, he testified that he never spoke about his website *trumpunionfree.org* with anybody including fellow anti-union employee Mike Cicutto, a fact that is inherently unlikely given that Tomasello assertedly devoted great time and resources into personally creating the site and purchasing buttons and signs to promote it. Tr. 1309.

2. Objection 4(b) and Objection 13—Llarull

a. Cicutto in the hallway on December 3

Cicutto works as a pool ambassador. December 3 was a workday for him, and he was on the clock except for his breaks. But that did not prevent him from spending large parts of his workday engaged in activities against the Union during times that he admitted he was not on break. Tr. 1124. Trump did nothing to discipline him for his rules violation.

The chain of events involving Llarull started a little after 12.10 p.m. At that time, Cicutto entered the EDR, served himself food, and then began marching from table to table confiscating union fliers that committee leaders had placed on tables. EX 37 at 12.11.30. A few moments later, Llarull began redistributing the fliers. *Id.* at 12.13.46. After she did so, Cicutto collected them from the table and balled them up, at one point seemingly prepared to grab a flyer out of a housekeeper's hand before she pulled it back. *Id.* at 12.15.37.

Cicutto exited the EDR and began tearing down union flyers from the wall in the

[16] Tomasello is a large man, easily twice the size of the housekeepers whom he was aggressively taunting.

passage way. As he did so, he partially tore down the settlement agreement in 28- CA-150529. EX 8 at 12.16.00. Llarull and Rivera were standing nearby, and Llarull immediately told him that he was not allowed to do what he had done. Cicutto paid her no heed, but continued ripping down union flyers as he walked away from her. At a certain point, Cicutto turned towards Llarull and Rivera, and the video shows he said something. *Id.* at 12.16.35. Llarull and Rivera testified that he used offensive language aimed at them, an allegation that was entirely consistent with Cicutto's aggressive and angry aspect. Cicutto testified that during this exchange Llarull threatened that she was going to have him arrested for having torn the settlement agreement. Llarull denied that she said anything about having Cicutto arrested; she testified that she said she was going to call the Union.[17]

Cicutto testified that Llarull photographed him tearing down union literature. The evidence shows that Llarull held her phone up, but it is more consistent with her sending a text message than taking a photograph. EX at 12.16.30.

b. Tomasello, Cicutto and Madison Gonzales in the EDR on December 3 and 4

Later that afternoon, Tomasello and Cicutto had a second round of conflict with committee members in the EDR. It started around 4.15 when Tomasello and Llarull had a visibly heated discussion, and carried on after that for the next several minutes with

[17] Mariscal also testified that Llarull threatened to have her arrested because the poster had been torn down. Tr. 540. In purported corroboration of the claim, Trump presented Minerva Salinas, who claims to have heard the statement despite that she was working in a room located off the hallway. Salinas testified strangely that when she asked Mariscal whether the cops were coming, Mariscal didn't speak to her and looked at her like she was "crazy." Tr. 2618.

Tomasello aggressively approaching the table where Llarull and Menjivar were seated. EX 28, 4.15.00. At 4.23.01, Cicutto arrived and sat down at Tomasello's table. Also present was anti-union employee Gonzalez. The conversation between Tomasello and Llarull continued for several more minutes, with Tomasello standing and pacing aggressively. At 4.34.38, Cicutto got up from the table. He testified he was walking towards the area where employees put dirty dishes, but he did not appear to have any dishes in his hand. He disappeared momentarily from the camera's view, and when he returned, showing his phone to Tomasello. It is not possible to determine what he did when he was out of camera view, but Llarull testified seeing that he had his cellphone as if he was taking a picture. She had reacted to Menjivar telling her Cicutto was taking photos. Tr. 2305; 2307; 2410. At that point (and not before that point, despite several minutes of aggressive conversation with Tomasello), Llarull took a picture of Cicutto and Tomasello. EX 26. Moments later, Gonzalez took a photo of Llarull and showed it to Cicutto and Tomasello. EX 21, 4.35.12-20. Tomasello approached the table where the committee leaders were standing at 4.38.46, and again the conversation heated up. Cicutto and Tomasello commenced clowning around, posing for photographs. *Id.* at 4.40.00.

The next day, December 4, Tomasello and Gonzalez were seated at a table in the EDR near Llarull at around 3.45 in the afternoon. Gonzalez claims to have seen Llarull take her cellphone out as if it take a picture, and so she took a picture of Llarull. Tr. 324-325. In response, Llarull took a picture of her. EX 25. So Gonzalez took another picture of Llarull. Tr. 327.

c. Ascencio at Petitioner's Rally on October 12

Llarull took a snippet of video with her cellphone showing Ascencio at the October 12 rally that featured presidential candidate Clinton. Llarull acknowledged taking the video, and testified that she did so simply because she found Ascencio's action to be of interest. Tr. 2381. She did not forward the video to anyone and did not post it to any kind of social media. Tr. 2382. Petitioner had no involvement with it.

The story took an odd twist because Ascencio claimed that a week later, Natividad Ramirez showed him the video while he was in the locker room. Tr. 871. Ascencio provided a detailed account of that conversation so one must assume that Ramirez was in a position to corroborate it. But, as the Hearing Officer appropriately noted, Trump did not call Ramirez to affirm Ascencio's account. Trump's argument that it had already called Ramirez as a witness and so did not need to ask her about Ascencio's claim is specious. Brief, 57, n. 12. Trump could have recalled Ramirez: it managed to recall its other supporters. The Hearing Officer was correct to draw a negative inference due to Trump's failure to provide Ramirez's testimony on this matter.

Ascencio was aware that Llarull videotaped him because Inti Alonzo, Ascencio's lead in the PAD department, watched Llarull videotape him as he stood between her and Ascencio. EX 41. It is patently clear that Alonzo told Ascencio what he had seen. That is for more plausible than Ascencio's tale that Ramirez showed it to him, given Trump's unexplained failure to call Ramirez as a corroborating witness.[18]

[18] The Hearing Officer properly discredited Ascencio's testimony on other grounds as well. Report, 17.

d. Alleged video of Ramos in EDR on November 28

The final allegation of coercive photography arose out of Susana Ramos' outburst in the EDR when it appeared that she intended to hit Llarull. Llarull, Rivera and Vargas all credibly testified that a few days before the election, Mariscal organized an event prior to the Trump Talk in which she would invite people to speak about the Union as a way of "getting informed." The predictable result was a heated exchange of views. At a certain point, Ramos—asserting that she heard Llarull claim that Trump was paying her—began ostentatiously expressing her disbelief that Llarull would say such a thing. Her voice already strangely hoarse, Ramos began theatrically expressing her outrage, shouting in barely controlled rage that attracted the attention of the entire room. As she shouted, she jabbed her finger at Llarull's shoulder, poking it forcefully. While employees were accustomed to Ramos' histrionics, this time it appeared she might blow a gasket. Tr. 2130. From all the conflicting accounts over Ramos' hyperbolic outburst, the only fact that matters is the uncontroverted fact that Ramos jabbed her fingers into Llarull's shoulder as she angrily confronted her. Tr. 1175. Ramos admitted that Llarull explained her call for videotaping as a warning against that unwelcome touching.

B. Legal Analysis

1. Photographing/video

The Hearing Officer correctly ruled that the third-party standard should apply to claims that committee members engaged in coercive photography or videotaping of anti-union employees' asserted Section 7 activities. The facts establish beyond dispute that the altercations which led employees to take photos of one another in the EDR arose

spontaneously in the course of back-and-forth exchanges between impassioned advocates. It would be no more feasible to conclude that Llarull and Vargas were agents of the union when they photographed Cicutto and Gonzalez than it would be that Cicutto and Gonzalez were agents of Trump when they took photographs of Llarull and other committee members. These were spur-of-the-moment acts that were clearly the impulsive decision of the employee who engaged in the conduct. Neither Petitioner, nor presumably Trump, gave instructions to their adherents to take these actions. Moreover, Trump presented no evidence that Petitioner created the appearance that it authorized employees to take photographs on its behalf.

Having properly ruled that Llarull and Vargas were acting in the capacity of employees and not agents of the Petitioner, the Hearing Officer correctly ruled that the photographing and videotaping did not create "a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hospital*, 270 NLRB 802, 803 (1984); *Friendly Ice Cream Corp*., 211 NLRB 1032, 1033 (1974); *Nu Skin Int'l, Inc*., 307 NLRB 223, 224-35 (1992); *Overnite Transp. Co. v. N.L.R.B.*, 140 F.3d 259, 268 (D.C. Cir. 1998) ("[T]he Board could reasonably conclude that the photography and videotaping by unidentified pro-union employees on election day did not create an atmosphere of fear and reprisal so as to render a free election impossible"). Not only was the photographing not objectionable, employees have a section 7 *right* to engage in photography to record working conditions or disparate treatment. *See White Oak Manor*, 353 NLRB 795, 801 (2009). At the very least, Section 7 protected Vargas' photographing bottles of chemicals left out and Llarull's photographing the destruction of

union literature by an employee who was on the clock.

Not only did Vargas and Llarull have a Section 7 right to photograph or call for videotaping of employees getting away with acts they could not get away with, the activity they were responding to was not Section 7-protected. With respect to Cicutto, while there is a Section 7-protected right to distribute literature, the Board has ruled that there is no Section 7 right to destroy the literature of another party, particularly while on duty. *See Austal USA, LLC*, 349 NLRB at 566 (2007) ("The destruction of company property, even if it is in the form of antiunion propaganda, is not protected activity."). In like manner, Ramos had no section 7 protected right to jab her finger into Llarull's arm, and so even if Llarull called for Ramos to be videotaped as a warning not to do that, this does not implicate any of Ramos' protected activity. *Re Saia Motor Freight Line, Inc.*, 333 NLRB 784 (2001) (not violated of Section 7 to videotape where legitimate security concerns exist). With respect to Vargas photographing Tomasello, she was responded specifically to the bottles of cleaning agents he had placed on the table, and explained that to him. There was no Section 7-protected activity implicated.

Trump relies on *Randell Warehouse of Arizona*, 347 NLRB 591 (2006), a case that is distinguishable even if party conduct were at issue here. There, a union representative snapped photographs of employees as a second representative offered them literature: employees had to choose whether to accept the leaflet knowing the union was recording the response. When an employee asked why the union was taking photos, the representative responded cryptically: "[t]t's for the Union purpose, showing transactions that are taking place." *Id.* at 591. The Board majority found this type of photography

coercive because "[a] reasonable employee would anticipate that the union would not be pleased if he or she failed to respond affirmatively to the union's efforts to enlist support." *Id.* at 594. The Board reasoned that, in the absence of a valid explanation conveyed in a timely manner, such photographing constitutes objectionable conduct. *Id.* at 591.

Subsequent to *Randell Warehouse*, the Board noted that the case was limited it to its facts. It wrote: "In *Randell Warehouse*, an unidentified individual (later shown to be a union agent) openly but without explanation took photographs of employees who, while leaving their employer's facility, accepted or declined to accept proffered union literature. The Board majority held that, *in those circumstances*, the photographing had a reasonable tendency to intimidate the affected employees." *In Re Enter. Leasing Co.-Se., LLC*, 357 NLRB No. 159, n. 3, 2011 WL 6853530 (Dec. 29, 2011) (emphasis added).

Regardless the continued viability of *Randall Warehouse*, it clearly does not reach the facts at hand. First, as stated above, Trump failed to prove that Llarull and Vargas engaged in photography or videotaping as agents of the union. Second, unlike the situation in *Randell Warehouse*, Llarull and Vargas did not photograph Tomasello or Cicutto engaged in any choice whether to support the union. In the December 3 incident, Llarull took pictures arising out of heated exchange in which Tomasello and his crew were lobbing insults, where Tomasello was pacing aggressively and at close proximity, and where Gonzalez and Cicutto were themselves taking photos. In the case of the December 4 incident, Tomasello and Gonzalez were not engaged in any protected activity at all: they were just sitting there while Gonzalez took photos of Llarull. In the

case of the October 12 Hilary Clinton rally, Ascencio was there trying to draw attention to himself; it cannot possibly be the basis of a challenge to the election held almost two months later that he was videotaped by a coworker for a few seconds.

In a day and age in which *everyone* is equipped with a powerful camera and video machine at all times (simply by having a cellphone), the notion that photographing coworkers in the manner that was shown here constitutes the basis to overturn an election is entirely untenable. The argument that the present case comes within the orbit of *Randall Warehouse*—where the employees' Section 7-protected choice to accept or decline a handbill was being recorded—trivializes the Board's reasoning in that case.

Finally, even if these cellphone camera shots can be deemed objectionable, they are entirely inconsequential. There was no evidence of dissemination beyond the group of hard-core anti-union employees who were involved in them. Whether the impact upon the election is analyzed under the third-party standard (as it must be) or the party standard (based upon some unfounded notion that Petitioner was responsible for this conduct), the result is the same. These allegations are entirely marginal, and could have had no realistic chance of affecting the outcome of the election.

2. Alleged threats

The Regional Director/Hearing Officer properly concluded that Vargas' alleged threat to call OSHA in response to Tomasello's placing bottles of cleaning agents on tables and Llarull's alleged threat to call the police in response to Cicutto's destruction of the Board settlement agreement and/or union literature were not objectionable to the extent either even occurred. Once again, both employees were acting in their capacity as

employees, and the alleged "threat" did not create a "general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hospital*, 270 NLRB at 803. To the contrary, there is no basis to conclude that Tomasello or Cicutto took the alleged threats seriously even if they occurred.

Moreover, the Regional Director correctly concluded that a threat to call the police in response to the tearing down of an NLRB notice posting is not objectionable conduct as a matter of Board policy. In these circumstances, it bears mention that Llarull and other employees had tolerated Cicutto's destruction of their own literature that morning without responding (there was apparently nothing they could do about it since he was allowed to ramble about the building while on the clock doing whatever he wanted to). It was not until Cicutto ripped the NLRB settlement posting was there any allegation that Llarull or anyone threatened to call the police. Even if Llarull made such a statement, she had a good faith basis to believe such action was appropriate. Employees like her—whom Trump had illegally suspended for wearing a union button and reinstated only after filing NLRB charges—could legitimately view the Board's enforcement measures as a matter meriting police protection.

Furthermore, Llarull's alleged threat to call the police in response to Cicutto's delinquency does not implicate Section 7 rights because Cicutto himself was not engaged in any protected activity. The evidence show that Llarull did not threaten to call the police, if she did at all, until Cicutto tore down the NLRB notice posting; certainly, the Board has never ruled that destroying such one of its own postings is protected, concerted activity. Even if one credits Cicutto's belief that Llarull threatened to call the police

because he had been destroying pro-union handbills, there is no Section 7-protected right to destroy another party's literature. *See Austal USA, LLC, supra*, 349 NLRB at 566. Accordingly, not only is the notion that Cicutto sincerely felt threatened by Llarull's alleged statement specious and laughable, even if he did, the claim fails as a matter of law. Cicutto was engaged in vandalism, not protected activity.

Moreover, assuming *arguendo* that either Llarull or Vargas threatened to call a law enforcement agency, Trump did not show that either Llarull and Vargas were anything less than sincere in the belief that the conduct they were responding to was illegal. *Pactiv Corp.*, 337 NLRB 898 (2002), *rev. denied sub nom. Operating Engineers Local 470 v. NLRB*, 350 F.3d 105 (D.C. Cir. 2003) (affirming judge's finding that an employer did not unlawfully contact a local sheriff about an employee's threatening behavior). Vargas had been trained by management that toxic chemicals could not be in eating areas. Llarull responded reasonably to Cicutto's hooliganism in removing a government document. Their alleged statements to call law enforcement agencies were specific to the conduct to which they were reacting, and did not carry any threat against any employee's legitimate anti-union activities.

For all the foregoing reasons, the Regional Director correctly overruled Objections 4 and 13. There is no basis to grant review.

Objection 6

The Hearing Officer correctly discredited the testimony of both Tomasello and Ascencio with respect to Objection 6.

Tomasello's testimony was utterly lacking in specificity and did not support the

allegation. He claimed he saw a woman circulating in the EDR purportedly writing down information on a pad. The woman approached him, but Tomasello did not recognize her. He guessed that it "could have been" one of the women whom he knew by name, but that "I really don't recall exactly." Tr. 1269. According to Tomasello, the *only activity* that this unidentified person was engaged in was "looking at folks, looking as if they're writing and looking at people's name tags." Tr. 1269. Given these meagre observations, the Hearing Officer was correct to reject Trump's conclusion that the person in question was creating a written list of employees who were wearing union buttons opposing the Petitioner. Putting aside for the moment that such conduct would not be objectionable even it had occurred, Tomasello's testimony was simply too vague to conclude *anything.*

The Hearing Officer was also correct to discredit Ascencio's testimony. He testified that an employee whom he identified as "Julio" and who wore the red-and-white button threatened him that the Union was creating a list of employees who did not support the Union and whom the Union was not going to represent.[19] Not only was the Hearing Officer right to reject Ascencio's claims as too vague to constitute conduct that interfered with the election, the evidence established that the alleged conduct occurred outside the critical period. Ascencio testified that the alleged conversation with "Julio" occurred some 45 days prior to Trump publishing a statement in June promoting it as part of its anti-union propaganda. Tr. 2729-2730. Therefore, the "Julio" conversation took place—if it took place at all—in mid-May, whereas the petition was filed in June. *In Re Accubuilt, Inc.*, 340 NLRB 1337, 1338 (2003) ("It is the objecting party's burden to

[19] There has never been a member of the organizing committee named "Julio." Tr. 2326.

demonstrate that objectionable conduct occurred during the critical period.")

The Hearing Officer correctly ruled that Trump's notion that union polling is objectionable fails as a matter of law as well. Board law firmly establishes that a union may monitor and actively poll employees as to whether they support the union without engaging in objectionable conduct. *See In Re Enter. Leasing Co.-Se., LLC*, 357 NLRB No. 159, supra at *3 ("[Although employer polling is generally assumed to be coercive and therefore unlawful, union polling is generally recognized as lawful activity."). In *Springfield Hospital*, 281 NLRB 643 (1986), *enfd.* 899 F.2d 1305 (2d Cir. 1990), pro-union employees asked their co-workers how they intended to vote and reported the results to the union. The union in turn created charts assessing the likelihood that the employee would vote in its favor. The Board dismissed the employer's contention that this was objectionable conduct because, as here, there was no evidence that the information was gathered in a coercive manner. *See Durham Sch. Servs., Lp & Int'l Bhd. of Teamsters, Local 991*, 360 NLRB No. 108 (May 9, 2014) ("whatever an employee may tell a union about how she *intends* to vote, and however a union may publicize that disclosure, the fact remains that the employee's actual vote will *be* secret"); *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB No. 71 (2011) (citing ballot secrecy in rejecting argument that employees whose names and pictures appeared in flyer would feel compelled to support union); *Windsor House C & D*, 309 NLRB 693, 697 (1992); *Kusan Mfg. Co.*, 267 NLRB 740 (1983) (not objectionable for union to solicit employees to sign petition affirming they would vote for union), *enfd*. 749 F.2d 362 (6th Cir. 1984); *J.C. Penney Food Department*, 195 NLRB 921 fn. 4 (1972) (not objectionable for union

to poll employees as to how they would vote), *enfd*. 82 LRRM 2173 (7th Cir. 1972); *Mercy-Memorial Hospital*, 279 NLRB 360 (1986) (not objectionable for union to ask prounion employees to report activities of coworkers who were assisting management), *enfd. sub nom. NLRB v. Mercy-Memorial Hospital Corp*., 836 F.2d 1022 (6th Cir. 1988).

Objection 7

Objection 7 alleges that various committee members, employees, and two union agents (Marie Mitchell and Mercedes Castillo) made threats against employees if they did not support the union. Trump failed to establish that the Regional Director/Hearing Officer's conclusion that no objectionable conduct occurred was clearly erroneous.

The Hearing Officer correctly found that Trump's witnesses consistently failed to testify with enough "specificity to provide sufficient context." Report 19. But Trump complains that, since the Hearing Officer was able to cobble together a summary of what Trump's witnesses were apparently trying to say, she logically erred in concluding that their accounts lacked sufficient specificity. That argument is meritless. The fact that the Hearing Officer was able—in many cases charitably—to set out some version of the allegation does not mean that Trump's witnesses testified credibly. To the contrary, they regularly contradicted themselves and one another; they changed their stories from one part of their testimony to the next; they expressed confusion as to central details; and they otherwise failed to state a credible claim that any person threatened them.

This is crucial because it was *Trump's* burden to present specific and credible testimony to establish the objectionable conduct, whether or not credible testimony was presented to controvert the claim. *See In Re Miller Indus. Towing Equip., Inc.*, 342 NLRB

1074, 1075 (2004) ("Without greater specificity as to Baker's words or elaboration on his manner of delivery, we are unable to conclude, on the strength of this evidence, that the phrases attributed to Baker contain an unlawful threat."); *Nat'l League of Prof'l Baseball Clubs*, 330 NLRB 670, 678 (2000) (ambiguous statements not sufficient to overturn the election); *Ohio New & Rebuilt Parts, Inc.*, 267 NLRB 420, 421 (1983) (owner's statement that he could not afford to increase wages and might "lose a lot of business" too vague to support finding that he threatened to close plant if employees selected union to represent them), enfd. on other grounds 760 F.2d 1443 (6th Cir. 1985), cert. denied 760 F.2d 1443 (1985); *United Builders Supply Co.*, *supra*, 287 NLRB at 1369 (statement by union supporter that it was in employee's "best interest to abstain from voting" too vague to constitute a threat).

Another reason that Trump was required to articulate its accusations with specificity is that the Board has insisted that *mere misrepresentations* during organization campaigns—including misrepresentations regarding what the law requires—are not objectionable. *See Midland National Life Ins. Co.*, 263 NLRB 127, 133 (1982) ("[W]e rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements."); *see Metropolitan Life Insurance Co.*, 266 NLRB 507, 508 (1983) (misrepresentations of law not objectionable). Trump failed to tender sufficient detail with respect to each alleged coercive statement to allow the Hearing Officer to determine that the purported statement actually constituted a threat as opposed to a non-objectionable misrepresentation of what Petitioner can do or must do under the law.

Finally, even were the Hearing Officer to have credited Trump's unreliable witness testimony, Trump further failed to establish that any committee member, or even union agent, had the power to the company to take adverse job consequences against any employee, or that any employee might reasonably believe that to be the case. It is black letter Board law that "[a] union agent's alleged threat of job loss to an employee is objectionable only if the employee could reasonably believe that the union or its agent had the ability to carry out the threat." *Labriola Baking Co.*, 13-RD-089891, 2015 WL 1777544, at *1 (Apr. 17, 2015); *Pacific Grain Products*, 309 NLRB 690, 691 (1992); *Janler Plastic Mold Corp*., 186 NLRB 540, 540 (1970); *see also Downtown Bld Servs. Corp.*, *supra*, 682 F.3d at 114 (quoting *Janler Plastic Mold Corp*.).

Trump again resorts to attacking Llarull's credibility to divert attention from the fact that its witnesses consistently failed to articulate credible allegations of threat. But this bait-and-switch maneuver fails to patch over the deficiencies in its evidence. *Each* of the witnesses whom Trump identifies at page 73 of its Brief lacked credibility entirely on *their own rights*:

- Perez's staggering about-face regarding to whom Llarull supposedly said "left, left," in what language she supposedly said it, how loudly she supposedly said it, and everything else rendered her testimony about any matter *worthless*. But her credibility problems did not end there. The vagueness of her recollection at to any "threat" and her bias as a pro-company advocate provided reasonable grounds to discredit her claims. Moreover, the Hearing Officer's findings regarding Perez's claims (which Trump called "sufficiently detailed", p. 72), do not themselves

provide evidence of any threat. Each of Perez's claims is commensurate with the conclusion that the employee speaking to her merely urged that, if Perez supported the union by wearing a union button (thereby helping the union to gain recognition), the union could then protect employees through a union contract guaranteeing better salary and benefits. There is no basis to conclude from Perez's testimony that the union was somehow going to punish employees who did not wear a button.

- Mariscal was also properly discredited. Her credibility problems were many. She denied, for example, being aware that union supporters wore buttons from June through late 2014 and she denied knowing that Trump had suspended them the first day they did so on June 25, 2014. She professed this ignorance despite that she is an anti-union zealot and worked side-by-side as a clerical worker with the very management officials who had suspended the union advocates. Tr. 2690-2691. Furthermore, as with Perez, the Hearing Officer's description of Mariscal's claim ("sufficiently detailed," according to Trump) does not constitute a threat. If Llarull told employees that if they wore union buttons, then in six months they would be full-time employees, receive health insurance, would be protected in their jobs, and nothing would happen to them, then so be it: the statement is simply a prediction that Llarull made about the success that the union would have if it won the election. Nobody could believe it was some kind of magical promise that Llarull could procure regardless the legal process that would unfold.
- Jones's testimony was vague and uncertain on its face. The supposed "threat"

Llarull made was as follows:

> [Llarull] just basically was wondering why we didn't want the Union in. Saying that if we did get it, just basically that we would get the benefits and if we didn't vote yes for it, that we wouldn't get the full times that I found out -- if the Union come in, that on call and the managers that work in the housekeeping office will be fired and stuff like that. So yeah, she was just basically telling us what would happen if we didn't vote yes.

Tr. 1014. Instead of explaining how this incomprehensible account contains any "threat," Trump throws up a smokescreen by attacking the Hearing Officer's integrity, accusing her of trying to "*get around*" Llarull's supposed credibility problems by imposing her "subjective opinion" as to the "seriousness" of the threat that union business agents were going to take over operation of the housekeeping efforts. Brief, pp. 73. Trump's *ad hominem* attacks on the Hearing Officer do not advance its argument. The Hearing Officer did not act unethically in drawing the logical conclusion that, because the notion that the union would supplant management through a *coup d'état* of the housekeeping department was so patently absurd, the proper conclusion is that Jones either misrecollected or miscomprehended. Either circumstance goes to her credibility.

- Luz Hernandez was likewise the undoing of her own credibility. As to the basis of Llarull's supposed threat, L. Hernandez testified that "[s]he told me to sign the card and wear the button so I could have my job protected." Tr. 1336. That is no threat at all. Later, L. Hernandez testified incoherently that Llarull told her on one *specific* occasion—she could not even approximate when—Llarull told her that "the people who did not want the Union were going to be fired" and that "if we

didn't wear the buttons, that we could not be protected." Tr. 1351. But in the next breath, she claimed that Llarull said this "every time she saw us." Tr. 1351. Trump's counsel struggled admirably to pin L. Hernandez down, eventually getting her to place the date of the conversation prior to Thanksgiving, and then again prior to October 25. Tr. 1353. But in the next breath, L. Hernandez again claimed that Llarull made the statement "almost every day that I saw her." Tr. 1353. The Hearing Officer correctly concluded that L. Hernandez was too imprecise and inconsistent to substantiate that Llarull made any threat.

- As with other employees whose credibility Trump defends, Campos' credibility is not an issue because the supposed "threat" that she heard Llarull make is no threat at all. The Hearing Officer found (once again, with "sufficient detail" according to Trump) that "[a]ccording to Campos, Llarull explained that if employee supported the Petitioner, the Petitioner would represent them, and that if they work the Petitioner's buttons, nothing would happen to their jobs." One must engage in unwarranted speculation to find any threat here. It is more plausibly a statement that, if employees supported the union (i.e., such that it won the pending election), the union would then represent them and if employees wore union buttons, nothing would happen to their jobs as a consequence of doing so.

But to the point of Campos' credibility, the Hearing Officer was correct to credit Adam over Campos. Having listened to and observed the witnesses, the Hearing Officer was well positioned to determine that Adam's demeanor was forthright and honest, and she provided specific responsive answers to the

questions asked. In contrast, Campos was argumentative, insisting angrily for example that Trump never disciplined Karla Menjivar for wearing a union button while acknowledging that she had no actual reason to know *why* Trump disciplined her. Tr. 967-968. Furthermore, Campos testified she observed Llarull canvas employees including a group of Ethiopians about their intention to vote in the election with Adam's assistance as translator, Tr. 963-964; 973; 978, in contrast, Adam and Llarull testified credibly that that canvassing was done by an Ethiopian coworker named Tenanyai, not Llarull. Moreover, Adam credibly testified that her coworkers' English is fine and she does not translate for them. Tr. 2502-2503; 2505; 2514.[20]

- In discrediting allegations that Ramirez had been threatened, the Hearing Officer properly focused on the improbability D. Hernandez and Martinez would make threaten her as a means of convincing her to support the union. It is commonplace for the trier-of-fact to give weight to inherent implausibilities in assessing the reliability of witness testimony. *See, e.g., Raleys & Indep. Drug Clerks Ass'n*

[20] The most reliable account of what Llarull told employees about button use came from Adam:

> BY MR. KRAMER: Ms. Adam, did Carmen tell you that the union button could protect you?
>
> A: Protect me from what?
>
> Q: Well, I guess that's -- my question is did she ever talk to you about how -- if or how the Union could protect you. Do you remember?
>
> A: No. It's just like wearing this, that means you need the Union. That's what it means. That's what they say.

Tr. 2513.

Raleys, 348 NLRB 382, 476 (2006); *In Re Amber Foods, Inc.*, 338 NLRB 712, 720 (2002). Martinez had known Ramirez for years, and got on well with her despite that she was a visible union opponent. Tr. 1700-1701. That he would suddenly start making threats was inconsistent with that longstanding working relationship and with his accurate understanding based on working at Mandalay Bay (a union casino) that that not everyone is required to join the union. Tr. 1698-1699. Ramirez testified vaguely and improbably that Martinez asked to sign an authorization card "everyday" from June until December; Martinez more logically recalled asking her a couple times to sign a card, though he spoke to her frequently about benefits the union hoped to win. Tr. 807; 1700. Ramirez could not pin down the time frame for any conversation she may have had with D. Hernandez. Tr. 804-805; 830-831. When she did finally articulate what the supposed statements that Martinez or D. Hernandez said to her, they were not threats as opposed to accurate statements that if the union did not gain representative status with her help, it could not represent her (or anyone else). Tr. 808; 830. Martinez and D. Hernandez both credibly denied making any threatening statements, and the Hearing Officer was correct to find their testimony more specific and straightforward than Ramirez's. Tr. 1698-1699; 2544. Moreover, there was no evidence that Ramirez had an objective basis to believe that D. Hernandez or Martinez—who were coworkers she had known for years—had any power to effectuate any adverse condition to her employment. To the contrary, Ramirez

admitted that she knew that the union would be required to represent everyone equally. Tr. 832-834.

- Trump also falls flat when it seeks to match the credibility of Natividad Ramirez against that of the far more credible Natividad Rodriguez. Rodriguez was clearly expressing a protected opinion against free ridership when she told Ramirez that she *wished* employees who did not support the union could be excluded from benefits. Tr. 2278. Such an expression of opinion is not objectionable under any logic. Flailing about for an argument, Trump concocts a violation of the Hearing Officer's sequestration order (by which Llarull was prevented from discussing her *own* prior testimony), and suggests that Rodriguez's detailed, straightforward description of the interaction with Ramirez was planted by Llarull. Brief, p. 75. Trump's argument is not only specious, it is highly misleading because the conversation to which Trump refers did not regard Rodriguez's description of her conversation with Ramirez. Tr. 2283-84.
- Trump's complaint that Gelardi took seriously D. Hernandez's "threat" that D. Hernandez would not get her a new uniform until Gelardi signed a card is likewise vacuous. D. Hernandez made the comment laughing, the two were friends, D. Hernandez hugged her after she said it, and *Gelardi laughed too*. Tr. 2524-2525. Management had previously explained to all housekeepers that the new uniforms were on the way, and D. Hernandez had no power to give Gelardi one. Tr. 2526. The notion that this self-evidently innocuous joke between two friends interfered with Gelardi's vote is meritless. *Worley Mills, Inc. v. N.L.R.B.*, 685 F.2d 362, 368

(10th Cir. 1982) ("a joking threat, apparently not taken seriously by the recipient and not shown to have intimated him will not upset the election result")

Based on a careful consideration of the evidence, the Regional Director/Hearing Officer correctly concluded that Trump failed to prove the existence of any threats, obviating the need to determine whether the third-party or the party standard applies to employee statements.[21] Moreover, Trump failed to prove that any isolated threat that may have occurred over the six month critical period could have possibly impacted the election results. *See St. Vincent Hosp., LLC & United Food & Commercial Workers Int'l Union, Local 1445, Afl-Cio*, 344 NLRB 586 (2005) ("The challenging party must prove by specific evidence not only that campaign improprieties occurred, *but also* that they prevented a fair election."); *Bon Appetit Management Co.*, 334 NLRB 1042 (2001) (isolated instances of interrogations or threats did not reasonably affect the results of the election); *Recycle America*, 310 NLRB 629 (1993) (unfair labor practices were not sufficient to set aside the election); *Season-All Indus.*, 276 NLRB 1247, 1257 (1985) (Trivial wrongdoing did not render election suspect following several months of campaigning). Trump's presents no clearly erroneous factual finding on this mundane issue of Board law that justifies the Board exercising review.

Objection 8

Trump asks the Board to grant review on the Regional Director/Hearing Officer's

[21] Trump effectively gives up on its argument that the Regional Director/Hearing Officer erred in finding that neither Marie Mitchell nor Mercedes Castillo made any threat during their house visits with employees, raising only a two sentence protest in its Brief that can only be described as symbolic. Brief, 75.

ruling that no objectionable conduct occurred based on the supposed "threat" that an unknown individual made to Ramos at the elevator and Llarull's supposed "threat" that certain hotel managers would be fired if the union came in. Trump's argument lacks merit.

The incident involving Ramos allegedly occurred when Ramos, as she stepped off an elevator, was told by an unknown person among a group getting on the elevator that "we're going to kick everybody out" if the union won, after which a coworker named Xiomara said "except for Susana because she is my friend." Contrary to Trump's argument, the Hearing Officer did not substitute a "subjective standard" by emphasizing that Ramos found the statement to be funny and knew that the statement was not true. To the contrary, she properly considered the context of the statement in determining whether it constituted a threat. *Worley Mills, Inc*., *supra*, 685 F.2d at 368 ("a joking threat, apparently not taken seriously by the recipient and not shown to have intimated him will not upset the election result"); *Serv. Employees Int'l Union, Nurses All., Local 121rn (Pomona Valley Hosp. Med. Ctr.) & Carole Jean Badertscher.*, 355 NLRB 234, 235 (2010) (statements must be viewed in their overall context to determine whether they constitute a threat); *see Rossmore House*, 269 NLRB 1176, 1176-1178 (1984), *aff'd* 760 F.2d 1006 (9th Cir. 1985) (whether employees are open and active union proponents is relevant to whether an interrogation should be considered unlawfully coercive); *Caterpillar Logistics, Inc.*, 362 NLRB No. 49 (Mar. 30, 2015) ("Although whether employer's threat must be judged on an objective basis (how a reasonable person would view it), the subjective reactions of employees may be considered in making this

determination"). In addition, a statement cannot be considered a threat where it obvious that the person making has no power to carry it out. *See* cases *supra*. The Hearing Officer properly considered the quip within its context to find that Ramos could not possibly have considered it to constitute any realistic threat against her employment.

The same is true with respect to Mariscal's claim that Llarull threatened that managers would be filed if the union came in. The Hearing Officer properly concluded that, even if Mariscal's testimony were credited, a statement that managerial employees would be fired if the union came in does not constitute a threat. No employee would reasonably believe that the union had the power to carry out such a purge, however justified one might be. *See* cases *supra*. Trump tries to bolster its argument by complaining that the Hearing Officer erred in failing to see that Keeran was a bargaining unit employee, claiming that the evidence refuted a finding that she was a 2(11) supervisor. But the evidence clearly established that Keeran was properly excluded from the bargaining unit as an "office clerical employee." *See* Order Directing Hearing on Objections; Tr. 561-564; 573-575; 2647-50. In any event, the Hearing Officer properly found that no employee would perceive Llarull's assertion—even if she made it—to constitute any kind of threat against their own employment regardless of Keeran's status.

Objection 9

Trump seeks review of the Regional Director/Hearing Officer's ruling that no objectionable conduct was proven with respect to the alleged threat by Dave Lamarca against Ascencio that Ascencio would be laid off for wearing an anti-union button.

Trump fails to address one of the decisive reasons for the Hearing Officer's

decision to discredit Ascencio. Ascencio had no actual knowledge who the individual who supposedly spoke to him in the EDR was, and his knowledge is based only on the fact that his manager told him who it might have been. Thus, the identification was based on triple hearsay: Ascencio related to his manager what the man supposedly looked like; the manager related to Ascencio who he thought that may have been; Ascencio testified to that identity on the witness stand. Not only was Ascencio's identification based on hearsay, the fact that Trump's own manager was ultimately responsible for the identification rendered it highly suspect. To cap it off, Ascencio then identified the Lamarca based upon a photograph that, in the Hearing Officer's own estimation, *did not look like Lamarca*! Tr. 2718-2719. Accordingly, there is no proof that Lamarca made any statement to Ascencio. This is on top of the rest of Trump's problems: Lamarca was not an agent of the union; no employee could reasonably believe that Lamarca had the authority to predict what might happen if the union won; and there was no dissemination of the statement.

Objection 10

Trump seeks review of the Regional Director/Hearing Officer's determination that Petitioner and/or committee members engaged in objectionable polling. Trump objects to the Hearing Officer's report on two basis. First, it argues that the Hearing Officer failed to find that the polling at issue in the objection was noncoercive. Second, it complains that the Hearing Officer followed existing NLRB law that rules that union polling—as opposed to employer polling—is not unlawful or objectionable.

With respect to the first argument, Trump merely incorporates the entirety of its

other objections to argue that the polling was conducted in a coercive manner. Thus, Trump argues that, if some employee made a threatening statement at *any* time prior to the election, then any polling the union conducted thereafter was tainted. The Hearing Officer correctly rejected this unlikely legal principle on the simple basis that Trump failed to provide any threatening statements. Trump is reduced to complaining that committee members were "persistent" in their polling efforts, but persistence is not coercion and puffed up rhetoric is no substitute for evidence. Trump's real argument is that it disagrees with Board law that treats union polling differently than employer polling. Brief, p. 85. The Regional Director/Hearing Officer were quite obviously correct in applying the law as it is, and not the law as Trump imagines it should be.

Objection 14

The Regional Director and Hearing Officer correctly overruled Objection 14. The fact that one page out of several pages of the NLRB notice posting in 28-CA-150529 hung partially detached from a wall for about seven minutes could not feasibly have created a "general atmosphere of fear and reprisal rendering a free election impossible". *Westwood Horizons Hospital*, *supra*, 270 NLRB at 803. Trump provides no legal authority in support of its innovative legal theory, and it presents no question justifying Board review.[22]

[22] As Trump points out, the Regional Director misinterpreted the evidence when he provided as an additional basis for overruling the objection that Llarull herself reposted the notice posting. In fact, Cicutto reattached the notice when he exited the EDR about seven minutes after Llarull had dislodged it: her apparent purpose in doing so was to have a record of the mischief that Cicutto had been up to earlier that day. But the Regional Director's factual

The Hearing Officer was absolutely correct in rejecting the unrealistic proposition that employees were deprived of a fair opportunity to express their view on union representation because the settlement notice was partially dislodged from a wall for seven minutes. Quite apart from the fact that there was no probative evidence that any employee even *took notice* that the notice was detached during this brief period, the very premise of Trump's argument is illogical and unpersuasive. The *only conclusion* that employees would reasonably draw from the fact that one of the pages of the notice was hanging by a corner is that the page had somehow gotten dislodged. That is *all*. Employees would not reasonably have concluded that Trump was responsible for the situation: the most they might have done was wonder how it had happened. Nor would employees logically have felt pressured to vote one way or the other because they saw the notice hanging by a corner. It is preposterous to argue—as Trump does—that employees would have felt compelled to vote for the union upon seeing the dislodged notice because they would have concluded they needed the union to protect them from Trump violating their rights in the future by virtue of Trump possibly having been responsible for the dislodging of the notice. The leaps of logic one must make to patch together this argument are impossible.

Trump seeks to distract the analysis from the implausibility of its logic by focusing instead on what it describes as Llarull's "nefarious actions" and "intentional purpose" in detaching the notice posting. Brief, p. 89-90. Trump's focus on Llarull's

---

error did not result in any prejudicial determination because—based on the facts as the Hearing Officer determined them—Trump's argument failed outright.

intention is a sure sign that it does not even believe its own argument. The point of the inquiry is not on Llarull's subjective intent in dislodging the poster (an entirely irrelevant fact of which employees at any rate had no knowledge), but on whether the few employees who may speculatively have seen it would logically have felt compelled to vote one way or the other in the election as a result. Trump is simply grasping at straws by positing that this event had any impact on the election. The Regional Director correctly overruled Objection Number 14.[23]

III. The Regional Director was correct to certify the election results.

The Regional Director and Hearing Officer correctly rejected each and every challenge that Trump made to the election. They properly ruled that committee members were not acting as agents of the Petitioner, and they properly weighed the evidence to find that no objectionable conduct occurred under any standard of review.

Trump did not prove that the election results should be disturbed even if it had managed to prove some isolated incident of misconduct. Trump argues that the Hearing Officer failed to look at the evidence "as a whole," but rather focused myopically on the individual objections that Trump was raising. Such arguments are frequently raised by losing parties that seek to convert inconsequential conduct into the basis for a new election. But the Board has admonished that "the cumulative impact argument may not be used to turn a number of insubstantial objections to an election into a serious

[23] Trump argues that Llarull showed her photograph to co-workers. In fact, the evidence established only that Llarull showed the photo to one employee—Celia Vargas—in the context of showing what Cicutto had done. Tr. 2412. Even speculating that any other workers overheard the conversation (and there is no evidence), the employee who did so would only have learned that Llarull's complaint was with *Cicutto.*

challenge." *Fresenius Usa Mfg., Inc. & Int'l Bhd. of Teamsters Local 445, Petitioner.*, 352 NLRB 679, 693 (2008), citing *Amalgamated Clothing & Textile Workers Union, AFL-CIO,CLC, supra,* at 1569. (D.C. Cir. 1984).

As the D.C. Circuit has stated:

> The representation election process under the NLRA is not an abstract exercise in achieving ideal conditions; it is rather an intensely practical process designed to maximize employee free choice under the very real constraints and conditions that exist in the nation's workplaces. One of these constraints is the fact that delay itself almost inevitably works to the benefit of the employer and may frustrate the majority's right to choose to be represented by a union; forcing a rerun election may play into the hands of employers who capitalize on the delay to frustrate their employees' rights to organize.

Id. at 1563. Trump's demand for a new election based on trivial allegations of misconduct are nothing more than an attempt to capitalize on delay and to frustrate the desire of the majority of employees to have union representation.

IV. Trump's procedural objections are meritless.

Finally, Trump makes two procedural objections that lack merit. It complains that the Hearing Officer erred in refusing to allow it to present evidence in favor of its theory that the Petitioner violated the Telephone Consumer Protection Act and it complains that the Hearing Officer erred in limiting its subpoena demand to documents related to matters alleged in its objection.

With respect to the TCPA theory, the Board's rules require a party to set out its objections within 14 days of the election. Rules and Regulations of the National Labor Relations Act, Rule 102.69. New evidence for setting aside an election may not be considered unless the objecting party has provided clear and convincing proof that the

evidence was not only newly discovered, but also previously unavailable. *John W. Galbreath & Co*., 288 NLRB 876 (1988). Trump presented no evidence why it could not raise its TCPA claim in a timely manner. It merely presented a statement of counsel, who stated "[w]e were not aware of it at the time." Tr. 2270. But Counsel provided no explanation, much less evidence, as to *why* Trump was justifiably unaware of the factual basis for its novel theory at the time it filed its objections. The Regional Director properly ruled that Trump had no basis for raising its late-filed objection.[24]

Trump also complained that the Hearing Officer erred in limiting the scope of Trump's subpoena request number 4. At the outset, Trump seeks to defend a subpoena request it did not actually make: Trump's subpoena request as actually phrased was grossly overbroad, seeking photographs or videotapes of *any* kind of activity—pro-union, anti-union, non-union, or anything else during the three week time period prior to election. The subpoena demand that Trump must defend here is the facially overbroad one it made, not the one that Petitioner agreed to respond to (and did respond fully to) after good faith accommodation. Thus, Trump's self-serving argument that it "agreed to limit its request" merely reflects the fact that its subpoena was wholly unenforceable to begin with. As it was, Petitioner produced all material within its possession to the extent that Trump could demonstrate through any kind of testimony or offer of proof that the

[24] Petitioner adamantly denies both that the testimony adduced at hearing supports any claim of a violation of the TCPA, and that any such violation occurred.

conduct formed the basis for its objection.[25]

The Hearing Officer was well within her discretion to limit Trump's inquiry into those photographs or video that Trump could substantiate by even *minimal* evidence might actually exist. This was inherently logical. Employees could not have felt coerced by such conduct unless they were aware of it. Moreover, the burden was not onerous. It was simply the burden that the law imposed upon Trump in framing its objections and submitting an offer of proof in support of them. Under the recently promulgated election rules, Trump was required to have "identif[ied] each witness the party would call to testify concerning the issue and summarizing each witness's testimony." 29 C.F.R. §§ 102.66; 102(c); 102.69(a). But where Trump had no *prima facie* evidence of objectionable conduct—even to the bare extent that some employee may have *heard* that Llarull had taken a photograph of another employee engaged in anti-union activity—the Hearing Officer acted within her discretion to preclude a fishing expedition.

CONCLUSION

For all the foregoing reasons, Trump's request for review should be denied. Trump failed to show that a substantial question of law is raised because of an absence or departure from officially reported Board precedent, that the Regional Director's decision was based on a substantial factual finding that was clearly erroneous on the record, that the conduct of the hearing or any ruling resulted in prejudicial error, or

[25] Such photographs were provided from Llarull. Petitioner had no responsive photographs. Trump also complains that it was prevented from obtaining photographs that might have been in the possession of other committee members, but Trump did not seek to subpoena such documents from them. Trump did not object to Petitioner's position that it would not seek to obtain documents from non-agents.

that there is a compelling reason for reconsideration of any important Board rule or policy. To the contrary, the interests of the Act are served by expeditiously rejecting review and guaranteeing the Section 7 rights of employees who voted by a majority in favor of union representation. The Regional Director properly certified the Petitioner as bargaining agent, and there is no basis for further review.

Dated: April 11, 2016

Respectfully submitted,

/s/Eric B. Myers

Eric B. Myers
DAVIS, COWELL & BOWE, LLP
595 Market Street, Suite 800
San Francisco, CA 94105
Phone: (415) 597-7200
Fax: (415) 597-7201
Email: ebm@dcbsf.com

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2016, a copy of **PETITIONER'S OPPOSITION TO TRUMP RUFFIN COMMERCIAL LLC'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE** was submitted by e-filing to the National Labor Relations Board E-Filing Web-site. I further certify that I emailed the foregoing document(s) to the following in accordance with Board Rules & Regulations Rule 102.114(i):

Cornele A. Overstreet, Regional Director — *Cornele.Overstreet@nlrb.gov*
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 95004-3099

Larry A. "Tony" Smith, Attorney at Law — *Larry.Smith@nlrb.gov*
National Labor Relations Board, Region 28
Las Vegas Resident Office
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, NV 89101-6637

Ronald J. Kramer — *rkramer@seyfarth.com*
SEYFARTH SHAW
131 South Dearborn Street, Suite 2400
Chicago, IL 60603-5577

William J. Dritsas — *wdritsas@seyfarth.com*
SEYFARTH SHAW
560 Mission Street, Suite 3100
San Francisco, CA 94105-2930

Attorneys for Respondent, TRUMP RUFFIN COMMERCIAL, INC., et al.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 11, 2016 at San Francisco, California.

/s/Yien Saelee
Yien Saelee